DOCKET

No. 88-1048-ASX
Status: GRANTED

Title: Robert J. Quinn, Jr., and Patricia J. Kampsen, etc., Appellants
v.
Wayne L. Millsap, et al.

Docketed:
December 22, 1988

Court: Supreme Court of Missouri

Counsel for appellant: O'Keefe,Kevin M.

Counsel for appellee: Webster,William L., Minardi,Andrew J., Freeman,Eugene P.

Entry	Date	Note	Proceedings and Orders
1	Dec 22 1988	G	Statement as to jurisdiction filed.
2	Jan 20 1989		Motion of appellees Wayne L. Millsap, et al. to dismiss filed.
3	Jan 25 1989		DISTRIBUTED. February 17, 1989
4	Feb 21 1989		PROBABLE JURISDICTION NOTED.
			**********
6	Mar 2 1989		APPELLANTS' OPENING BRIEF AND JOINT APPENDIX DUE ON OR BEFORE CLOSE ON BUSINESS ON FRIDAY, MARCH 24, 1989. APPELLEES' BRIEF DUE ON OR BEFORE CLOSE OF BUSINESS ON FRIDAY, APRIL 7, 1989.
5	Mar 8 1989		SET FOR ARGUMENT, APRIL 25, 1989. (4th CASE)
7	Mar 23 1989		Joint appendix filed.
8	Mar 23 1989		Brief of appellants Robert J. Quinn, et al. filed.
9	Mar 23 1989		Brief amici curiae of ACLU of Eastern MO, et al. filed.
11	Mar 24 1989		Lodging received. (10 copies).
12	Mar 25 1989		Record filed.
		*	Certified copy of original record received.
13	Apr 5 1989		CIRCULATED.
14	Apr 6 1989	X	Brief of appellees Wayne L. Millsap, et al. filed.
15	Apr 17 1989	X	Reply brief of appellants Robert J. Quinn, et al. filed.
16	Apr 25 1989		ARGUED.

JURISDICTIONAL

STATEMENT

No. 88-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

vs.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

KEVIN M. O'KEEFE*
UTHOFF, GRAEBER, BOBINETTE & O'KEEFE
906 Olive Street - Suite 300
St. Louis, Missouri 63101
(314) 621-9550

*Counsel of Record

(Continued on Inside Front Cover)

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

And

JESS W. ULLOM
JESS W. ULLOM, ESQ.
222 South Central, Suite 900
Clayton, Missouri 63105
(314) 863-8484

Attorneys for Appellants

QUESTIONS PRESENTED

1. Do all citizens of a state have a constitutional right to be considered for public service on a tax-supported public body without being discriminated against by a state law which limits eligibility for membership on that body to owners of real property?

2. Does the Fourteenth Amendment's prohibition against invidious discrimination by a state against one segment of its citizens apply to a tax-supported public body granted the exclusive authority to write a comprehensive charter to reorganize government functions and financing for presentation to the electorate by referendum?

3. In reviewing a challenge to discrimination in eligibility for service on a tax-supported public body exclusively authorized to draft a plan of governmental reorganization, is traditional equal protection analysis requiring a rational basis for the eligibility limitation sufficient, or do such circumstances require a heightened level of scrutiny?

PARTIES

Appellants, Robert J. Quinn, Jr. and Patricia J. Kampsen, are residents and registered voters of St. Louis County, Missouri, who do not own real property and are representatives of a class consisting of registered voters of the State of Missouri who do not own real property.

Appellees Wayne L. Millsap, Chairman, Joseph S. Balcer, Robert L. Bannister, Sandra Hasser Bennett, Allen S. Boston, Claude Brown, William G. Cocos, Jr., Jo Curran, Albert H. Hamel, Thomas P. Dunne, C. Fran Emerson, Gretta Forrester, William J. Harrison, J. P. Morgan, Catherine Rea, Daniel Schlafly, Henry S. Stolar, Lucille Walton and Margaret Bush Wilson are members of the St. Louis City-County Board of Freeholders and comprise all the members of the said Board of Freeholders.

Appellee the State of Missouri is one of the fifty United States. The provision at issue in this case is Article VI, Sections 30(a) and (b) of the Constitution of the State of Missouri, an enactment of Appellee State of Missouri.

Appellee John D. Ashcroft is the Governor of the State of Missouri.

Appellee Gene McNary is the County Executive of St. Louis County, Missouri.

Appellee Vincent C. Schoemehl, Jr. is the Mayor of the City of St. Louis, Missouri.

Appellees Ashcroft, McNary and Schoemehl are the authorities responsible for appointing members of the Board of Freeholders.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

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vs.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal From the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

Robert J. Quinn, Jr. and Patricia J. Kampsen respectfully appeal to the Supreme Court of the United States from a judgment of the Supreme Court of Missouri issued on September 23, 1988 in *Millsap v. Quinn,* 757 S.W.2d 591 (Mo.banc 1988).

OPINIONS BELOW

This case is an appeal from the Supreme Court of Missouri. On September 23, 1988, the Missouri Supreme Court, en banc, entered its Judgment holding that, while membership on the Board of Freeholders was restricted to real property owners, the Fourteenth Amendment to the United States Constitution is not applicable because a Board of Freeholders does not exercise general governmental powers. The Opinion of the Missouri Supreme Court is officially reported at *Millsap v. Quinn*, 757 S.W.2d 591 (Mo.banc 1988). The slip opinion, number 60688, dated September 23, 1988, is reproduced at A-1.

Appellants had appealed to the Missouri Supreme Court from an adverse decision by the trial court. On May 24, 1988, the Honorable Arthur Litz of the Circuit Court of St. Louis County, State of Missouri, entered a Memorandum and Judgment declaring Article VI, §§ 30(a) and (b) of the Constitution of the State of Missouri to be valid and in compliance with the Constitution of the United States, and granting Respondents' Motion for Summary Judgment. The unreported opinion, cause number 572794, is reproduced at A-9.

As set forth in the Statement of the Case, *infra,* the parties to the case in this appeal are also the parties in the associated case of *Quinn v. State of Missouri.* That matter was originally tried in the United States District Court for the Western District of Missouri and presently is on appeal to the United States Court of Appeals for the Eighth Circuit.

In that case, Appellants sought, and the district court granted, the same declaratory and injunctive relief denied by the Supreme Court of Missouri in this case. The state court proceedings were initiated when, on the day prior to trial in the district court, the federal court defendants (Appellees here) filed an action against the federal court plaintiffs (Appellants here) for parallel declaratory relief as to the validity of Article VI, §§ 30(a) and (b). Because of the relevancy of the proceedings in

that associated case, the judgments and orders of the district court and the court of appeals are reproduced in chronological order at A-28 - A-61.

JURISDICTION

This case is a class action suit pursuant to Title 42 U.S.C. § 1983 for declaratory judgment and injunctive relief regarding the constitutionality of Article VI, §§ 30(a) and (b) of the Missouri Constitution. The Sections in issue establish a system for the appointment and operation of a Board of Freeholders to draft a plan for reorganization of local governments in the area of the City of St. Louis and St. Louis County, Missouri, and the method of adopting and effectuating such a plan.

This case is an appeal from a decision of the Supreme Court of Missouri, the highest court of the State of Missouri. *Mo. Const., Art. V, § 2.* The judgment of the Supreme Court of Missouri was entered on September 23, 1988. A-1. No motion for rehearing was filed and the judgment was final on that date.

Notice of Appeal to the Supreme Court of the United States was filed on December 16, 1988 with the clerk of the Supreme Court of Missouri, A-22, and a copy of said Notice was also mailed to the clerk of the Circuit Court of St. Louis County, the court wherein the case was previously tried, by first class U.S. Mail, postage prepaid. *Rules 10.3, Supreme Court Rules.* A copy of the Notice was mailed by first class U.S. Mail, postage prepaid, to counsel of record for all parties to the proceedings as shown on the copy of said Notice reproduced at A-22. *Rules 10.2, 28.3, Supreme Court Rules.*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) for review by direct appeal of a final judgment rendered by the highest court of the State of Missouri. This cause draws in question the validity of Article VI, §§ 30(a) and (b) of the Constitution of the State of Missouri on the grounds that said Sections are repugnant to the Equal Protection Clause of the

Fourteenth Amendment to the Constitution of the United States. The decision from which this appeal is taken was in favor of the validity of said sections. *28 U.S.C. § 1257(2).*

The date of the final decision of the Supreme Court of Missouri, September 23, 1988, was less than ninety days after June 27, 1988. *Pub. L. 100-352, §§ 3, 7, June 27, 1988, 102 Stat. 662, 664.*

Therefore, this Court has appellate jurisdiction of the case.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, §§ 30(a) and 30(b) of the Constitution of the State of Missouri

> The full text of said constitutional provisions are set forth and reproduced at A-25. *Rule 15.1(f), Supreme Court Rules.*

STATUTES INVOLVED

Title 28, United States Code

§1257. State courts; appeal; certiorari

> Final judgments or decisions rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Title 42, United States Code:

§1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The metropolitan area of St. Louis, Missouri, is comprised primarily of the City of St. Louis and St. Louis County. Each is a distinct and separate governmental entity. The City of St. Louis is adjacent to St. Louis County, but it is not located within that County and is established in the Missouri Constitution as a separate county unto itself. *Mo. Const., Art. VI, § 31.* Within St. Louis County there are approximately ninety separate cities, as well as a considerable amount of unincorporated territory and several fire districts and other municipal corporations providing local government services.

Article VI, §§ 30(a) and (b) of the Constitution of the State of Missouri (hereinafter jointly referred to as § 30) provide for the creation of a Board of Freeholders which is granted the exclusive power to draft a plan:

1. to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or

2. to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or

3. to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or

4. to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or

5. to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county.

Mo. Const., Art VI, § 30(a); A-25.

A Board of Freeholders under § 30 consists of nineteen members. Nine members from the City of St. Louis are appointed by its Mayor and nine members from St. Louis County are appointed by its County Executive. In each instance, appointees must be approved by the legislative bodies of the respective jurisdictions. The nineteenth member, not from the City or County, is appointed by the Governor of Missouri. *Mo. Const., Art. VI, §§ 30(a) and (b)*; A-25, A-26.

Such a Board may be created from time to time, on an ad hoc basis, upon receipt of petitions signed by the requisite number of registered voters. *Mo. Const., Art. VI, § 30(a)*; A-25. When

so activated, the Board is allowed one year to write a plan effectuating the powers listed above, during which time all expenses for the Board's operations are paid equally from the general revenue funds of the City and County. *Mo. Const., Art. VI, § 30(b)*; A-27.

It was stipulated at trial that the general revenue funds of the City and County each include funds derived from taxes imposed on all taxpayers, both owners of real property and those who do not own real property. Only those citizens of the state who are registered voters *and* owners of real property are allowed to serve on a Board of Freeholders.[1]

When completed, the freeholders' plan is filed with the election authorities in the City and County for an election on a date set by the Board. If the plan is approved by separate majorities in the City and County it becomes the "organic law of the territory . . . and shall take the place of and supersede all laws, charter provisions and ordinances inconsistent therewith. *Mo. Const., Art. VI, § 30(b)*; A-27.

The present Board of Freeholders was convened on September 28, 1987 pursuant to petitions which stated that the subscribers sought to "establish a board of St. Louis area property owners (freeholders) . . . for the purpose of formulating and adopting a plan for the partial or complete government of all or any part of the County and the City." A-1, n. 1.

By stipulation in the trial court, it was established that Mayor Schoemehl, after preparing a list of nominees, was advised by legal counsel for the City that ownership of real property was a requirement for appointment to a Board of Freeholders. Since one of Mayor Schoemehl's selections did not own such property, that candidate was not considered further for appointment. A-5.

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[1] "We recognize membership on the Board of Freeholders was restricted to owners of real property." *Millsap v. Quinn*, 757 S.W.2d 591, 595 (Mo.banc 1988); A-7.

Similarly, it was stipulated that after the County Executive prepared his list of appointees, legal counsel for the County also advised that real property ownership was a qualification for service on a Board of Freeholders. Upon receipt of that advice, and prior to submitting any nominations to the legislative body, county land records were examined to confirm that each appointee had an ownership interest in real estate. A-4.

Governor Ashcroft stipulated that he required ownership of real property as a qualification of any person he would consider for appointment as the nineteenth member of the Board. A-5.

While litigation between these parties has been pending, the Board of Freeholders held numerous meetings and public hearings and received presentations from government representatives, university professors, experts from various areas and local citizens. Of the myriad subjects and approaches considered, several proposals were ultimately incorporated in a plan written, adopted and filed by the Board pursuant to § 30. The Board has now scheduled an election for approval of that plan on June 20, 1989.

Under the authority of § 30, the Board of Freeholders approved a plan which entails the following components:

— a County-wide reduction of property taxes;

— imposition of a new 1% gross earnings tax in the County;

— levying a 6% tax on nonresidential utility consumption in the County;

— establishment of, and new taxation to support, a City-County economic development district and a metropolitan council to evaluate area problems and propose solutions to the citizens;

— reorganization of St. Louis County government functions and financing;

— consolidation of all existing cities and unincorporated areas in the County into approximately forty reorganized municipalities;

— reorganization of the system for delivery of fire and emergency medical services throughout the County; and

— modification of the formula for distribution of sales tax revenues among local governments in the County.

Litigation between these parties was initiated shortly after the Board of Freeholders was convened. Appellants, acting individually and on behalf of a class consisting of all registered voters of the State not owning real property, filed a complaint under *Title 42 U.S.C. § 1983* in the United States District Court for the Western District of Missouri. Appellants alleged that § 30 violated the rights guaranteed to the plaintiff class by the Equal Protection Clause of the Fourteenth Amendment in that service on a Board of Freeholders was restricted to owners of real property. A-53.

After all the parties who are Appellees in this Court were joined as defendants, the district court issued a temporary restraining order to enjoin further enforcement of § 30 pending a hearing on Appellants' claim for preliminary and permanent injunctive and declaratory relief. A-28. On Appellees' appeal to the United States Court of Appeals for the Eighth Circuit, the restraining order was initially stayed but later was modified and reinstated by that court. A-31.

One day prior to trial on the merits of Appellants' complaint in the district court, Appellees filed a petition for declaratory judgment in the Circuit Court for the County of St. Louis, State of Missouri, naming all plaintiffs in the federal district court as parties defendant. That case, in which Appellees sought a declaration that § 30 is constitutional, is the subject of the present appeal.

Prior to any resolution of the state case, the district court declared that § 30 violated the Fourteenth Amendment, both facially and as applied, and permanently enjoined enforcement of the provision. A-34. On appeal of that judgment, a divided panel of the Eighth Circuit concluded on April 26, 1988 that the district court should have abstained and ordered the parties to proceed to trial in the state court. A-61. The court of appeals stated that a full opinion would be issued later. To date, no opinion has been issued.

Thereafter, Appellants filed a counterclaim in the state court again alleging that § 30 violated the equal protection rights of persons not owning real property and seeking declaratory and injunctive relief under Title 42 U.S.C. § 1983. The parties filed a stipulation of facts and cross motions for summary judgment. The trial court sustained Appellees' motion and denied relief on Appellants' claim. The court concluded that § 30 did not require property ownership as a condition of eligibility for service on the Board of Freeholders. A-19.

On appeal, the Supreme Court of Missouri ruled that appointments to the Board of Freeholders under § 30 were restricted to owners of real property. A-7. However, the court sustained the ruling against Appellants because it concluded that the Board of Freeholders did not exercise any "general governmental powers" and, therefore, the Equal Protection Clause of the Fourteenth Amendment had "no relevancy." A-7. It is that judgment which Appellants now appeal to this Court.

It must be noted that, as this jurisdictional statement was being prepared, the parties were directed by the Eighth Circuit to submit supplemental briefs on the effect of the ruling by the Supreme Court of Missouri on the pending appeal of the judgment from the U.S. District Court for the Western District of Missouri. Briefs were submitted on December 19, 1988 as directed. As of this date, no further actions have been taken by the Court of Appeals.

REASONS WHY THIS APPEAL REQUIRES PLENARY CONSIDERATION

I

A Property Ownership Qualifiction For Service On A Board Of Freeholders Under Art. VI, § 30 Of The Missouri Constitution Violates The Fourteenth Amendment Because It Is Clearly Contrary To The Right Of All Citizens To Be Considered For Public Service Free From Discrimination Based On Criteria Which Are Not Reasonably Related To Achieving A Legitimate State Objective.

1. Prior decisions of this Court reflect the clear unconstitutionality of this provision of the Missouri Constitution.

The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall . . . deny to any person . . . the equal protection of the laws." *U.S. Const., Amend. XIV.*

Applying this requirement to the question of whether a state can condition eligibility for public service on the ownership of real property, this Court has already spoken clearly and forcefully:

> . . . the appellants and the members of their class [non-freeholders] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

Turner v. Fouche, 396 U.S. 346, 362, 90 S.Ct. 532, 541, 24 L.Ed.2d 567 (1970).

Turner concerned an appointed school board selected from among freeholders (real property owners). Seven years later this Court again emphasized the inherent unconstitutionality of property ownership qualifications for public office. A Loui-

siana decision upholding a state statute requiring ownership of real *or personal* property for appointment to an airport commission was reversed with the following one-sentence decision, citing only *Turner:* "The judgment is reversed." *Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977).

On the authority of *Turner* and *Chappelle,* Appellants initiated the litigation between the parties and sought relief by their counterclaim in the state court. Appellants challenged the provisions of the Missouri Constitution establishing a system by which property owners are the only persons eligible to serve on a unique tax-supported board which exercises the exclusive right to draft "the organic law" of the City and County of St. Louis. *Mo. Const., Art. VI, § 30(b).*

The Supreme Court of Missouri has previously described § 30 as being "a broad grant of legislative power" the scope of which is at least equivalent to the range of subjects which the state legislature may address. *State of Missouri ex inf. Dalton v. Metropolitan St. Louis Sewer District,* 275 S.W.2d 225, 228 (Mo.banc 1955). The activity of a board of freeholders under § 30 is, in essence, a constitutional convention for the City and County of St. Louis.

Turner v. Fouche did not resolve the question of whether freeholder qualifications are subject to heightened scrutiny or to traditional equal protection review. Rather, the irrational nature of the criterion dictated that a property ownership qualification failed to satisfy any standard:

> [T]he . . . freeholder requirement must fall even when measured by the traditional test for denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.

Turner v. Fouche, 396 U.S., at 362, 90 S.Ct., at 541.

In sustaining an equal protection challenge to large filing fee requirements for primary elections in Texas, this Court described in similar language the minimal standard demanded of states by the Fourteenth Amendment:

> However, even under conventional standards of review, a State cannot achieve its objective by totally arbitrary means; the criterion for differing treatment must bear some relevance to the objective of the legislation.

Bullock v. Carter, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972).

The *Turner* opinion noted that, as in the instant case, one can satisfy the requirement by ownership of a "single square inch of land" and under such circumstances "it seems impossible to discern any interest the qualification can serve." *Turner,* 396 U.S., at 363, 90 S.Ct., at 542.

A freeholder requirement is simply so broad in application that it does not operate with sufficient precision to be reasonably related to any valid objective:

> Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.

Id., 396 U.S., at 364, 90 S.Ct., at 542.

2. Neither § 30 nor the decision being appealed evidences any rational relationship between ownership of real property and service on a Board of Freeholders.

In its opinion below, the Missouri court did not identify any state objective which requiring the ownership of real property might legitimately advance. A property ownership qualification is too attenuated to bear any rational relationship to the duties of a board of freeholders. The classification fails to assure that appointees possess desirable qualities while arbitrarily excluding

those who do. There is nothing about the purpose of the board or the effect of its decisions which is related to the limited class eligible to serve so critical a function as drafting a plan of area-wide governmental reorganization.

Ownership of land at the time of appointment to the Board bears no relationship whatsoever to knowledge or intelligence, but, at most, is merely a reflection of economic status. In fact, such a standard could be satisfied by corporation or persons who are comatose or institutionalized. § *257.040 RSMo. 1986; Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 730, 93 S.Ct. 1224, 1230, 35 L.Ed.2d 659 (1973).

Given that ownership of as little as an inch of land satisfies the requirement, and that there is no requirement that the land owned even be located within the state, the classification is not at all indicative of concern about matters of regional governmental structure. It is clearly so arbitrary as to erase any rational relationship between the requirement and the authority of a Board of Freeholders.

There is no necessity that a freeholder must have owned property or resided in the area for any length of time. Thus, as to providing assurance that members of the board have useful experience to "formulate . . . a plan for the . . . government of . . . the city and the county," *Mo. Const., Art. VI, § 30(a),* the fact that persons acquire a real property interest on a given day does not miraculously vest them with relevant experience they had not acquired the previous day.

In short, Missouri has not articulated any rational basis for the qualification required by § 30 and a reasoned examination reflects no legitimate purpose to be served by excluding all citizens of the state who do not currently own real property.

3. The provision of the Missouri Constitution at issue does not come within the limited and unique circumstances under which some property ownership requirements have been approved previously by this Court.

This Court has sustained a property ownership criterion against equal protection challenge in only the most restrictive of circumstances. *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973); *Ball v. James,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981). In each instance there was a clear pronouncement by the state of the legitimate objective for which the legislation was designed.

The California water storage district in *Salyer* was established for the special limited purpose of the acquisition, storage and distribution of water for farming purposes. *Salyer,* 410 U.S., at 728, 93 S.Ct., at 1230. The entire cost of the district's activities was apportioned among landowners according to the benefit they received. *Id.* 410 U.S., at 724, 93 S.Ct., at 1227. The assessments of the district were a lien on the land within the jurisdiction. *Id.* 410 U.S., at 731, 93 S.Ct., at 1231. Land not benefited by the operation of the district could be withdrawn. *Id.* 410 U.S., at 724, 93 S.Ct., at 1227.

In the companion case of *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* decided the same day as *Salyer,* the Court also concluded that the Wyoming watershed district at issue was one of "special or limited purpose whose activites have a disproportionate effect on landowners," *Associated Enterprises,* 410 U.S., at 744, 93 S.Ct., at 1237, and that "landowners are primarily burdened and benefited" by the district. *Id.,* 410 U.S., at 745, 93 S.Ct., at 1238.

Similarly, in *Ball v. James,* the Court considered a water reclamation district in Arizona which had as its "primary and

originating purpose" the "narrow" function of storing and conserving water which was then "distributed according to land ownership." *Ball,* 451 U.S., at 367, 101 S.Ct., at 1819. Though most of the costs incurred by the district were met by the generation and sale of electric power, such activities were stipulated by the parties to be "incidental to the water functions which are the District's primary purpose." *Id.* 451 U.S., at 368, 101 U.S., at 1820. While the district was a "nominal public entit[y], in order to obtain inexpensive bond financing," it was essentially a business enterprise "created by and chiefly benefiting a specific group of landowners." *Id.* 451 U.S., at 368, 101 S.Ct., at 1819.

The rationale of the *Salyer, Associated Enterprises* and *Ball* decisions actually supports the conclusion that Section 30 is unlawfully discriminatory.

In the case of a Board of Freeholders exercising the authority specified in § 30, neither the purpose nor any of the effects of such a public entity has a direct or discrete relationship only to the limited class of people who are eligible to participate in the board's work: real property owners.

To the contrary, the dangers which attend discriminatory exclusion of a class of citizens are evident from the concepts of the plan to which this Board of Freeholders has agreed. From among all existing sources of local revenue, the proposal adopted by the members of the board of freeholders reduced only the *property* tax rate in St. Louis County. They specifically shifted that tax burden from a property basis to an income basis, thereby increasing the taxes of working non-freeholders and reducing the one tax common only to the members of the board and the class of persons whom they represent.

The circumstances of this case underscore the wisdom of this Court's holding in *Turner.* The exception recognized in *Salyer, Associated Enterprises* and *Ball* is appropriate in rare and unique instances. But the Missouri court's untenable attempt to contradict the clear language and intent of *Turner* and render

the Fourteenth Amendment irrelevant cannot be allowed to stand.

II

The Decision Of The Supreme Court Of Missouri Is Erroneous And, If Affirmed, Would Be A Dangerous Precedent Because That Court Failed To Analyze The Issues Presented In The Case In The Manner Required By The Equal Protection Clause.

The decision of the Supreme Court of Missouri in *Millsap v. Quinn* is an echo of that court's similarly decision twenty years ago, dealing with an apportionment challenge to a junior college district in *Hadley v. Junior College District of Metropolitan Kansas City,* 432 S.W.2d 328 (Mo.banc 1968). In that decision the Missouri court concluded "the one man, one vote principle does not properly apply" because the district was "*not* a unit of local government having general governmental powers." 432 S.W.2d 328, 334, quoting from *Avery v. Midland County,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968) (emphasis in original).

On appeal, the Court reversed the Missouri court's *Hadley* decision, noting that the district performed "important governmental functions" and it had "sufficient impact throughout the district" to require strict scrutiny Fourteenth Amendment review under *Avery. Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 54, 90 S.Ct. 791, 794, 25 L.Ed.2d 45 (1970).

In its opinion in the *Hadley* case, this Court identified one possible exception to otherwise universal Equal Protection requirements:

> . . . there might be some cases in which a State elects certain functionaries whose duties are so far removed from normal governmental activities *and* so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required.

Id., at 56, 90 S.Ct., at 795 (emphasis added).

The Supreme Court of Missouri has once more attempted to focus solely on the idea of "general governmental powers" as the *sine qua non* of Fourteenth Amendment analysis. The court below ignored the two-prong test set out by this Court in *Hadley* and reiterated in *Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973) and *Ball v. James,* 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981). As stated in *Ball v. James,* discrimination based on ownership of real property:

> *requires* us to consider whether the peculiarly narrow functions of this local governmental body *and* the special relationship of one class of citizens to that body releases it from the strict demands of the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment.

Ball v. James, 451 U.S., at 357, 101 S.Ct., at 1814 (emphasis added).

The Supreme Court of Missouri has acknowledged that § 30 classifies the citizens of the State into two categories on the basis of property ownership. Service on a tax-supported constitutional body exclusively authorized to "formulate and adopt" a plan for the "partial or complete government of all or any part of the city and the county" (*Mo. Const. Art VI, § 30(a)*) is "restricted to owners of real property." *Millsap v. Quinn,* 757 S.W.2d 591, 595 (Mo.banc 1988). Those who do not own such property are denied participation in this most critical process.

In essence, the court below condoned this discrimination on the following basis:

(1) "*Avery, Hadley, Salyer, Associated Enterprises* and *Ball* ... all held that [the right to vote] is protected by the Equal Protection Clause only when the unit of government in question had general governmental powers" (*Millsap v. Quinn* at 594-595; A. 7);

(2) the "federal constitutional right" to be eligible for public service without discrimination based on property ownership recognized in *Turner v. Fouche* is a "lesser" right than the right to vote (*Id.* at 595; A. 7);

(3) "since the [Board of Freeholders] exercises no general governmental powers, the Equal Protection Clause has no relevancy." *Id.*

This approach is fatally flawed in several respects.

1. The decision below erroneously limits the protection available under the Fourteenth Amendment.

The Missouri court's premise that Fourteenth Amendment protection is available "only" when the governmental body exercises broad powers is a misstatement of the law. The protection of the Equal Protection Clause is constantly available.[2] In some instances, "peculiarly narrow functions" "far removed from normal governmental activities" may be exercised by a segment of the public uniquely and directly impacted and yet satisfy the requirements of the Fourteenth Amendment. *Ball v. James,* 451 U.S. at 357, 101 S.Ct., at 1814; *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S., at 54, 90 S.Ct., at 794. But in no event are the guarantees of the United States Constitution irrelevant or unavailable, as contended by the Supreme Court of Missouri.

2. The Supreme Court of Missouri failed to conduct any equal protection analysis, let alone apply an appropriate standard of scrutiny.

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[2] "[C]areful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer v. Union Free School District,* 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969).

The issue of whether the right to be eligible for public service without invidious discrimination is a "lesser" right than others is only pertinent in determining what level of scrutiny is appropriate when addressing a given equal protection claim. There are three elements which must be considered in determining whether a violation of the Equal Protection Clause exists: the character of the classification in question; the interests which the State claims to be protecting; and the interests of those who are disadvantaged by the classification. Depending on the interest affected or the classification involved, heightened levels of scrutiny are required. *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968); *Dunn v. Blumstein,* 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972).

The court below made no attempt to address the character of this property ownership classification or to identify any state interest which the freeholder qualification of § 30 may serve. The discussion of these issues in §I of this material, *supra,* leads inexorably to the conclusion that the State of Missouri has no legitimate interest which this discriminatory classification advances. *Turner v. Fouche,* 396 U.S., at 363, 90 S.Ct., at 542. Regardless of the level of scrutiny appropriate, the character of a property owenrship qualification violates the substantial and recognized right of every citizen to be considered for public service without the burden of such discrimination. *Id.,* at 362, 90 S.Ct., at 541; *Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977).

The threshold requirement which the Fourteenth Amendment places upon a court faced with a challenge to a state law treating one group of citizens differently than others is to "measure the basic validity of the classification." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979). The *Millsap* opinion fails (and, indeed, expressly declines) to measure in any fashion the validity of Missouri's classification of its citizens into two categories. To real property owners, the State extends the unique benefit of

eligibility for public service on a tax-supported public body exclusively authorized to draft a constitution[1] superseding all conflicting state statutes, local charters and ordinances. *Mo. Const., Art. VI, § 30(b); State of Missouri ex inf. Dalton v. Metropolitan St. Louis Sewer District,* 275 S.W.2d 225 (Mo.banc 1955). Participation in the critical process of formulating this comprehensive government charter is withheld from those who do not own real property. Only when it comes to voting on acceptance of the freeholders' product are both classes of citizens again united. There is no validity to this distinction.

Appellants suggest that the Missouri Supreme Court erred in failing to review this case under a heightened, strict scrutiny standard. The nature and activity of a Board of Freeholders is most closely analogous to the process of selecting candidates for office by the use of a primary election. The primary serves to determine who will be presented to the electorate for consideration. Similarly, in proposing a plan of governmental reorganization for presentation to the electorate, the Board is determining what issues will be addressed and what reforms will be presented to the public for consideration at the election on the plan.

Participants in primary elections exercise *no* governmental authority at all. Even the winners of the election gain no governmental powers until and unless they succeed in another election at which all voters (not just those of one party) may participate. Yet, state regulations affecting eligibility of candidates for primary elections are "closely scrutinized" and must be found "reasonably necessary to the accomplishment of legitimate state objectives" if they are to satisfy the requirements of the Equal Protection Clause. *Bullock v. Carter,*

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[1] "[the plan] shall become the organic law of the territory", *Mo. Const., Art. VI, § 30(b).*

405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). The Missouri Supreme Court's failure to apply any recognizable standard of equal protection review, let alone failing to approach the level of strict scrutiny, resulted in the erroneous decision now being appealed.

3. The court below completely failed to recognize that the exception it relied upon requires analysis of two distinct issues and erred in holding that a Board of Freeholders does not exercise governmental power.

Finally, the court below completely failed to identify any aspect of the authority exercised by a Board of Freeholders which would create a "special relationship of one class of citizens" (*Ball v. James*, 451 U.S., at 357, 101 S.Ct., at 1814) or "so disproportionately affect" (*Hadley v. Junior College District*, 397 U.S., at 56, 90 S.Ct., at 795) owners of real property so as to comply with the Fourteenth Amendment. Consider the "important governmental functions" and extensive "impact throughout the district" (*Id.*, at 54, 90 S.Ct., at 794) which the present Board of Freeholders has already exercised. The "plan" which has been filed by this Board provides for the following: (1) imposition of an earnings tax and increased taxation on utility bills, coupled with a reduction in property taxes; (2) reorgainzing the system for emergency public safety services for all residents of St. Louis County; (3) reformation of municipal territories throughout St. Louis County; and (4) redistribution of sales tax receipts among local governments in St. Louis County.

There is nothing about property ownership which is uniquely affected by or specially related to the right to participate in drafting a plan for local government reorganization. Likewise, to dismiss the unique and critical authority exercised by a Board of Freeholders as not being a significant governmental function is myopic and illogical. There is no governmental power greater than the exclusive ability to write the comprehensive charter to

which the government itself must conform and within which all other power must be exercised.

The Supreme Court of Missouri was wrong, both in the analysis it purported to undertake and the conclusions it reached. If the decision is allowed to stand, it will read out of the Equal Protection Clause half of the existing strict test which permits only the most limited exceptions to the general rule against classifying the franchise.

The State of Missouri cannot provide for creation of a Board of Freeholders, give it broad power to restructure government itself, and then dismiss the importance of that body when challenged. If Missouri wishes to delegate to citizen bodies the right to draft metropolitan constitutions, then all citizens must be given an equal opportunity to participate in the process.

Missouri's failure to afford non-freeholders their right to equality under the laws of the State violates the Equal Protection Clause. *Turner v. Fouche*, 396 U.S. 346, 363, 90 S.Ct. 532, 542, 24 L.Ed.2d 567 (1970); *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977).

III

CONCLUSION

The decision now appealed to this Court cannot be allowed to stand as a proper application of the Equal Protection Clause in matters of delegation of legislative authority to discriminatorily selected public bodies. The inaccurate and incomplete analysis of the Supreme Court of Missouri reflects a misapplication of established authority to discriminatorily selected public bodies. The inaccurate and incomplete analysis of the Supreme Court of Missouri reflects a misapplication of established constitutional principles and seriously undermines significant elements of the Fourteenth Amendment's guarantee of equal protection of law to all citizens.

When this issue was last before this Court, in *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977), the Court summarily reversed the decision below. It may not be inappropriate to act similarly in this instance.

Appellants pray that the decision of the Supreme Court of Missouri be reversed and that the relief previously requested by Appellants be ordered.

Respectfully submitted,

Kevin M. O'Keefe*
Uthoff, Graeber, Bobinette &
O'Keefe
906 Olive Street - Suite 300
St. Louis, Missouri 63101
(314) 621-9550

And

Jess W. Ullom
Jess W. Ullom, Esq.
222 South Central, Suite 900
Clayton, Missouri 63105
(314) 863-8484

Attorneys for Appellants

*Counsel of Record

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI

en banc

Filed: September 23, 1988

Wayne L. Millsap, et al.,

Respondents

v.

Robert J. Quinn, Jr., et al.,

Appellants

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

Division 5

The Honorable Arthur Litz, Judge

This appeal involves the constitutional validity of article VI, sections 30(a) and 30(b) (collectively, "section 30") of the Constitution of Missouri. We have exclusive jurisdiction. Mo. Const. art. V, § 3.

Petitions[1] to create a Board of Freeholders were filed with the election officials of St. Louis City and County. Following

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[1] The petition read, in part:

> A PETITION to establish a board of St. Louis area property owners (freeholders) to study the governmental structures and responsibilities with St. Louis County and the City of St. Louis. Should a reorganization plan be recommended, there would be a vote of St. Louis County and City residents to determine whether or not they want to accept the plan.
>
> . . . . .
>
> The undersigned voters . . . do hereby present this petition proposing the exercise of the powers granted to the people of the City of St. Louis and St. Louis County by Section 30 of Article VI of the Constitution of the State of Missouri for the purpose of formulating and adopting a plan to provide for the partial or complete government of all or any of the County and City.

certification of the petitions, section 30[2] required both the mayor of St. Louis and the county supervisor of St. Louis County to appoint nine "electors" to the Board. In addition, the Governor of Missouri was required to appoint one elector to the Board. To this end, Mayor Vincent C. Schoemehl, Jr., County Executive Gene McNary, and Governor John D. Ashcroft, respondents in this action, developed lists of candidates for appointment to the Board. Each developed several criteria by which the candidates were measured. Mayor Schoemehl's criteria included a history of community and civic service, leadership ability, intelligence and independence, and geographic and racial distribution. County Executive McNary sought candidates who had no vested interest in a governmental

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[2] Article VI, section 30(a) provides, in part:

§ 30(a) Powers conferred with respect to intergovernmental relations — procedure for selection of board of freeholders

Section 30(a). The people of the city of St. Louis and the people of the county of St. Louis shall have power . . . to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county. The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. Upon filing with the officials in general charge of elections in the city of a petition proposing the exercise of the powers hereby granted . . . and the certification thereof by the election officials to the mayor, and to the governor, then, within ten days after the certification the mayor shall, with the approval of a majority of the board of aldermen, appoint the city's nine members of the board . . . . Upon the filing with the officials in charge of general elections in the county of a similar petition . . . and the certification thereof by the county election officials to the county supervisor and to the governor, within ten days after the certification, the county supervisor shall, with the approval of the majority of the county council, appoint the county's nine members of the board . . . .

Section 30(b) contains a similar provision for the appointment of a freeholder by the governor.

organization in the St. Louis area, showed leadership in the community, had an interest in County problems, would be able to work with other Board members, and represented a geographical mix of the County. Governor Ashcroft's criteria included Missouri residency, no residency in or strong identity with St. Louis City or County, sufficient time to devote to service on the board, and an ownership interest in real property.

The Board members were eventually appointed, and the Board undertook the process of developing a plan for the reorganization of the St. Louis City and County governments. On November 9, 1987, appellant Robert J. Quinn[3] and his counsel met with the Board and informed the members that it was Quinn's belief that the real property ownership requirement for membership to the Board was a violation of the Equal Protection Clause of the U.S. Constitution. The following day, Quinn filed a class action in the United States District Court for the Western District of Missouri, seeking a declaration that section 30 was unconstitutional. The District Court issued a temporary restraining order on January 25, 1988. This order was stayed two days later by the United States Court of Appeals for the Eighth Circuit. On February 11, 1988, the Eighth Circuit dissolved the stay and filed an opinion affirming, with modifications, the temporary restraining order.[4] *Quinn v. Missouri*, 839 F.2d 425 (8th Cir. 1988).

On February 16, 1988, one day before trial on the merits in the District Court, respondents filed an action for declaratory relief in the Circuit Court of St. Louis County. The District

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[3] Mr. Quinn is the Missouri state representative from the 80th District. He is a resident of St. Louis County but owns no real property. In this action, Mr. Quinn represents a class of individuals who are residents of Missouri but who own no real property.

[4] The Eighth Circuit allowed the Board to continue working on the plan but prohibited any final action or proposal of the plan until disposition by the District Court.

Court eventually ruled that the freeholder provision of section 30 was unconstitutional, both on its face and as applied. *Quinn v. State of Missouri*, 681 F.Supp. 1422 (W.D.Mo. 1988). However, the Eighth Circuit reversed without opinion on the grounds that the District Court should have abstained from deciding the case pending the outcome of the state litigation. Appellants subsequently filed a counterclaim in the Circuit Court seeking a declaration that Section 30, on its face and as applied, violated the Equal Protection Clause. Appellants also sought to dissolve the Board and enjoin the future enforcement of section 30. Both sides moved for summary judgment, and on May 24, 1988, the Honorable Arthur Litz of the St. Louis County Circuit Court upheld the constitutionality of section 30. This appeal followed.

I.

Appellants contend that sections 30(a) and 30(b) are facially unconstitutional in that both sections require ownership of real property in order to be considered for public office. Appellants contend that such a classification discriminates against persons owning no interest in real property and is not rationally related to any legitimate state interest.

It was stipulated that the list prepared by County Executive Gene McNary was reviewed by his Executive Assistant, William Skaggs, who received an opinion from the County Counselor's office that an additional requirement was an ownership interest in real property, and that following this opinion Skaggs then checked the County Assessor's records to make certain each person McNary had placed on the list of candidates did meet that real property ownership criterion.

It was stipulated that the list prepared by St. Louis Mayor Vincent Schoemehl, Jr., was also reviewed following receipt of an opinion from the City Counselor's office which added the additional requirement of an ownership interest in real property, and that the Reverend Paul C. Reinert did not have an

ownership interest in real property. Father Reinert was not considered further for membership on the Board.

It was further stipulated Governor John Ashcroft's candidate for membership on the Board also had to meet, among other criteria, the requirement of an ownership in real property.

In *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), appellants challenged a freeholder requirement for membership to a county board of education on the grounds that such a requirement violated the Equal Protection Clause of the fourteenth amendment. The Court first noted that "under Georgia law a 'freeholder' is any person who owns real estate." *Id.*, 396 U.S. at 348, 90 S.Ct. at 534, 24 L.Ed.2d at 572, n. 1. In addressing whether the freeholder requirement was unconstitutional, the Court stated

> We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

Id., 396 U.S. at 362-63, 90 S.Ct. at 541, 24 L.Ed.2d at 580. The Court held that "the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Id.*, 396 U.S. at 362, 90 S.Ct. at 541, 24 L.Ed.2d at 580.[5]

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[5] The Court refused to decide whether a heightened level of equal protection scrutiny was required. However, property ownership has never been defined as a suspect class, and the right to be considered for public service has not been coined a fundamental right.

In *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977), an East Baton Rouge Parish requirement of "owning property assessed in East Baton Rouge Parish" as a qualification for service on an airport district commission was held to violate *Turner*.

In our view, however, *Turner* does not control our determination of constitutionality on this appeal, because *Turner* dealt with a unit of local government which had general governmental powers.

II.

We consider determinative here the cases examining voting qualifications based on real property ownership. They began with *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). *Reynolds* declared that voting is a fundamental constitutional right. Later, *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), established the "strict scrutiny" equal protection review standard, and threw into question all voting schemes based upon the ownership of real property. Two cases, *Avery v. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), and *Hadley v. Junior College District*, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970), seemed to leave a small crack in the broad holding of *Reynolds* by suggesting that there might be situtations where limitations on voting could be permissible. *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), *Associated Enterprises, Inc., v. Toltec Watershed Improvement District*, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973), and *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981), proved to be these cases.

In *Salyer* the Court upheld a property based voting scheme for a California water district board of directors. In *Associated Enterprises* a Wyoming watershed district's similar property based voting scheme was upheld. In *Ball* an Arizona property

based voting scheme involving an agricultural improvement district was upheld.

In our view, it is significant that *Avery, Hadley, Salyer, Associated Enterprises*, and *Ball* involved the right to vote, (declared a fundamental right in *Reynolds*), and that all held that such right is protected by the Equal Protection Clause only when the local unit of government in question had general governmental powers. Does it follow that greater protection should be afforded under the Equal Protection Clause when a lesser "federal constitutional right", as in *Turner* and on this appeal, is involved? We think not.

The essential question on this appeal then becomes: Does the Board of Freeholders have general governmental powers which would require application of the Equal Protection Clause?

In Missouri "[t]o govern is to control the workings or operation of, and to determine, guide, and regulate." *State v. Neill*, 397 S.W.2d 666, 669 (Mo. banc 1966). The Board of Freeholders serves only to recommend a plan of reorganization to the voters of St. Louis City and St. Louis County. It "cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services". *Ball, supra*, 451 U.S. at 366, 101 S.Ct. at 1818, 68 L.Ed.2d at 160. It can recommend ad valorem property taxes and sales taxes, but it cannot levy and collect them. In sum, the Board of Freeholders has no general governmental powers.

We recognize membership on the Board of Freeholders was restricted to owners of real property. However, we hold that the composition of the Board of Freeholders does not violate the Equal Protection Clause because the Board of Freeholders does not exercise general governmental powers. Since it exercises no general governmental powers, the Equal Protection Clause has no relevancy here.

The judgment is affirmed.

Robert T. Donnelly, Judge

ALL CONCUR.

APPENDIX B

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team B

Division 5

Wayne L. Millsap, Chairman and Joseph S. Balcer, et al.,
Members of the St. Louis City-County Board of Freeholders,

The State of Missouri and John D. Ashcroft,
Governor of the State of Missouri

Gene McNary, St. Louis County Executive

Vincent C. Schoemehl, Jr.
Mayor of the City of St. Louis
Plaintiffs,

vs.

Robert J. Quinn, Jr. and Patricia J. Kampsen
individually, and on behalf of all other similarly
situated individuals,
Defendants.

MEMORANDUM AND JUDGMENT

This action is before the Court on Plaintiffs' Petition For Declaratory Judgment and Defendants' Counterclaim seeking the same relief. All parties seek a determination of whether Article VI, Sections 30(a) and 30(b) of Missouri's Constitution (sometimes referred to herein as "§30") comports with the

Fourteenth Amendment to the United States Constitution (the Equal Protection Clause) and is otherwise constitutional; a determination whether the members of the St. Louis City-County Board of Freeholders (sometimes referred to herein as the "Board") were duly appointed; and a determination of whether the general concepts of a plan agreed to by the Board are in compliance with the Constitution of the United States and Missouri's Constitution. Defendants also request attorneys' fees and expenses pursuant to 42 U.S.C. § 1983, *et seq*. All parties urge that this action be maintained as a class action pursuant to Missouri Supreme Court Rule 52.08.

All Plaintiffs have filed or joined in Motions For Summary Judgment. Defendants have also filed Motions For Summary Judgment. In conjunction with these motions, the parties have submitted stipulations of fact, exhibits, a transcript of proceedings in the case of *Robert J. Quinn, Jr., et al v. The State of Missouri, et al.*, Cause No. 87-4492-CV-5, pending in the United States District Court for the Western District of Missouri, a judgment in that case, and an order of the United States Court of Appeals for the Eighth Circuit which reversed the District Court. The parties also submitted extensive memos of law.

The trial of this action, as well as the hearings on the parties' Motions For Summary Judgment, were heard before the Court on May 16, 1988. At that time, Plaintiff Wayne L. Millsap, Chairman of the Board, appeared in person and by his attorneys; Defendants Robert J. Quinn, Jr. and Patricia J. Kampsen appeared in person and by their attorneys; and all other parties appeared by their attorneys. The parties waived the right to present evidence in addition to that submitted in support of the various Motions For Summary Judgment. The trial of this action and the hearings on the parties' Motions For Summary Judgment proceeded on the pleadings, filings, and evidence discussed above and on the arguments of counsel.

FACTUAL BACKGROUND

Section 30 provides a mechanism by which the people of the City and County of St. Louis are given the power to partially or completely adjust territorial boundaries and municipal governance in the St. Louis City/County area. This mechanism is initiated through a petition process by persons seeking the appointment of a board which is denominated a "Board of Freeholders." This Board develops a plan which is then submitted to a vote of the people. If a majority of the voters in both the City and County of St. Louis approve the plan it becomes "the organic law of the territory therein defined." §30 provides that the "Board of Freeholders" consist of "nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county."

Plaintiffs JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, THOMAS P. DUNNE, CATHERINE FRANCES EMERSON, GRETTA FORRESTER, ALBERT H. HAMEL, WILLIAM J. HARRISON, WAYNE L. MILLSAP, J. P. MORGAN, CATHERINE REA, DANIEL L. SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON (sometimes referred to herein as "Members") are Members of the Board having been appointed pursuant to §30. Plaintiff, GENE McNARY (sometimes referred to herein as "County Executive McNary"), is the County Executive of St. Louis County, Missouri, and the official responsible for appointing the members of the Board who are electors of St. Louis County. Plaintiff, VINCENT C. SCHOEMEHL, JR. (sometimes referred to herein as "Mayor Schoemehl"), is the Mayor of the City of St. Louis, Missouri, and the official responsible for appointing the members of the Board who are electors of the City of St. Louis. Plaintiff, JOHN D. ASHCROFT (sometimes referred to herein as "Governor Ashcroft"), is the Governor of the State of Missouri

and the state official responsible under §30 for appointing the member of the Board who does not reside in either the City of St. Louis or of St. Louis County, Missouri.

Defendant, ROBERT J. QUINN, JR. (sometimes referred to herein as "Quinn"), is a resident of St. Louis County, Missouri and is the elected Missouri State Representative from the 80th District. Defendant Quinn is and has been since January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri. Defendant, PATRICIA J. KAMPSEN (sometimes referred to herein as "Kampsen"), is a resident of St. Louis County, Missouri and a practicing attorney within the metropolitan St. Louis, Missouri area. Defendant Kampsen is and has been since before January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri.

Neither Defendant Quinn nor Defendant Kampsen owns an interest in real property. Defendants Quinn and Kampsen represent a class consisting of residents of the State of Missouri who are electors but who do not own an interest in real property. That class of resident electors is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to that class, and Defendants' claims are typical of the claims of the class. Defendants Quinn and Kampsen are appropriate class representatives and they have fairly and adequately represented the interests of the class in this action.

The people of the County of St. Louis and the people of the City of St. Louis, in order to exercise the power given them under §30, filed with the officials in general charge of elections in the County of St. Louis and the City of St. Louis, respectively, petitions proposing to exercise the power granted in §30, which had been signed by registered voters of the County of St. Louis and the City of St. Louis in such number as to equal three percent of the total vote cast in the County and City, respectively, at the last general election for governor.

Upon the filing of the requisite petition in St. Louis County, County Executive McNary established criteria for individuals from St. Louis County whom he would consider for appointment to the Board. County Executive McNary determined that he wished to appoint individuals to the Board who (1) had no vested interest in any governmental organization in the St. Louis Metropolitan area; and (2) showed leadership in their community; and (3) had an interest in County problems; and (4) would be able to work together; and (5) represented a geographical mix of St. Louis County. County Executive McNary in making his selection of Members to the Board, did not consider whether the candidates owned an interest in real property. Prior to submission to an approval by the St. Louis County Council it was determined that all of County Executive McNary's choices owned an interest in real property.

Upon filing of the requisite petition in St. Louis City, Mayor Schoemehl established criteria for individuals from the City of St. Louis whom he would consider for appointment to the Board. Defendant Schoemehl determined that he wished to appoint individuals to the Board who (1) had a history of community and civic service and experience; and (2) had shown a leadership ability; and (3) were smart and independent and would be perceived as such by the community; and (4) were distributed geographically and racially among city residents. Mayor Schoemehl sought to have a "blue ribbon" panel to serve as members of the Board. In initially developing his list of potential candidates for the Board, Defendant Schoemehl did not consider whether or not any of the individuals he placed on the list had an ownership interest in real property. Subsequently, it was determined that one candidate did not own an interest in real property and, based upon an opinion of counsel, Mayor Schoemehl did not consider this candidate further. Mayor Schoemehl's candidates were approved by the St. Louis City Board of Aldermen. In making his final selection of candidates for membership on the Board Mayor Schoemehl sought to appoint individuals who would represent all citizens of the St.

Louis metropolitan area and did not intend to appoint any individual who would have any bias in favor of or against individuals who had an ownership interest in real property.

Upon receipt of petitions signed by the requisite number of residents of St. Louis County and the City of St. Louis, Governor Ashcroft determined that he wished to appoint an individual to the Board who (1) was a resident of the State of Missouri; and (2) did not live in either the City or the County of St. Louis; and (3) had no strong identity to either the County or City of St. Louis; and (4) had time to devote service on the Board; and (5) had an ownership interest in real property. Governor Ashcroft sought to appoint an individual to the Board who would represent all citizens of the State of Missouri and did not intend to appoint any individuals who would have any bias in favor of or against individuals who had an ownership interest in real property.

Upon their appointment, the members of the Board held an intitial meeting on September 28, 1987, and since then have proceeded with the discharge of their duty. They have held in excess of twenty meetings which were open to and attended by members of the public and the news media. Various committees of the Board have also met in meetings which were open to an attended by members of the public and the news media. In addition, the Board has held at least twenty-one public hearings throughout the St. Louis metropolitan area at which the Board gave an opportunity to the citizens of St. Louis City and St. Louis County to address the Board and allowed citizens, municipalities and interested organization to make suggestions, statements and comments to the Board concerning the discharge of the Board's duties.

The Board had heard numerous presentations by government representatives, university professors, experts from out-of-state, citizens and citizens groups. The Board retained a full-time administrator who is a professor from the University of

Missouri, St. Louis. In addition, the Board engaged, a community relations consultant and a public accounting firm to provide various services in connection with the Board's work. Seven additional staff people, some of whom are faculty or graduate students from the University of Missouri, St. Louis were retained to perform secretarial, research, drafting and other necessary services.

The Board is charged with the responsibility of returning a plan to the appropriate official of St. Louis City and County within one year after its appointment and, therefore, time is of the essence in allowing the Board to proceed with its mandate. The Board has approved in general concept the following components of a proposed plan:

> The reorganization of municipal governments in St. Louis County into 42 separate municipalities with a Transition Commission to assist in needed adjustments;
>
> The reorganization of County government and the manner in which County governmental functions are financed;
>
> A St. Louis City/County economic development district to promote jobs, economic growth and development in the City of St. Louis and St. Louis County;
>
> A St. Louis City/County metropolitan council to evaluate City/County problems and needs and to propose recommendations for solutions to the citizens of the City and County;
>
> A plan for financing components of the proposed plan which includes a 1% earnings tax in St. Louis County, a rollback of the County property tax, a 6% nonresidential gross receipts tax on utilities in St. Louis County, a modified formula for sales tax distribution in St. Louis County, earnings tax distribution in St. Louis County, earnings tax revenue sharing among municipalities and financing provisions for the St. Louis City/County economic development district and metropolitan council;

A plan for reorganization of the delivery of fire protection and emergency medical services in St. Louis County.

The Board and its staff are working on detailed development of the general concepts included in the proposed plan.

Defendants Quinn and Kampsen claim that the Board is improperly constituted since membership on the Board is limited to owners of real property and such limitation is violative of Article VI and of the First, Ninth, Fourteenth and Fifteenth Amendments of the United States Constitution. In addition, Defendants claim that the petition used to establish the Board is invalid. Furthermore, Defendants claim that the manner in which the Plaintiff Board Members were appointed is violative of the foregoing provisions of the United States Constitution. Finally, Defendants claim that the general concepts of a plan agreed to by the Board violates the United States Constitution and Missouri's Constitution.

A controversy presently exists between Plaintiffs and Defendants as to whether the Board is a constitutionally constituted body; whether the Plaintiff Board Members were properly appointed and whether the Plaintiff Board Members can exercise the mandate given to them by submitting a plan which contain the general concepts agreed upon by the Board.

The interests of Plaintiffs and Defendants are in fact adverse, the parties hereto have legally protectable interests involved, and it is timely that a judicial determination by made of the questions involved. The Court's declaration of the laws of the State of Missouri and the Constitution of the United States will terminate the uncertainty which has arisen from Defendants' claims concerning the Board.

ANALYSIS OF THE LAW

This appears to be a case of first impression. Art. 6 Sec. 30(a) of the Missouri Constitution provides in part: "The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one elector of some other county." Thus the only qualification for members is that they be electors.

Nowhere is the phrase "board of freeholders" or the word "freeholder" defined. The only definition of the word "freeholder" research found is in the Missouri statutes in the chapter on Education, Ch. 160.011; "Freeholder" means any person who has an estate in land which may be inherited or an estate in land for life or for an indefinite period including any tenant by the entireties. The term "board of freeholders" to this Court has a similar meaning as a "board of commissioners" or some other such designation. In Webster's 3rd New International dictionary, unabridged, the word "freehold" is defined as (1) the owner of a freehold, and (2) a public officer in New Jersey serving on a board that has charge of a county and being similar to a county commissioner or supervisor. In the N.J. case of *DeFeo v. Smith,* 51 N.J. Super. 474, 107 A.2d 68 (1954) the county board of chosen freeholders was held to be the legislature of the county, having management and control of county property and its financial interest, and has exclusive jurisdiction over all matters pertaining to county affairs. The members of the boards were held to be public officers holding positions of public trust and stand in fiduciary relationship to people whom they have been elected and appointed to serve. (*Driscoll v. Burlington Bridge Co.*, 8 N.J. 433, 86 A2d 201 (1952) cert. denied 73 S.Ct. 25, 33, 34, 344 U.S. 838, 97 L.Ed. 652, rehearing denied 73 S.Ct. 181, 182, 344 U.S. 888, 97 L.Ed. 687.

There is no doubt that a strict interpretation of "freeholder" in a property law sense is that it applies to one who owns a freehold interest in real property. Defendants here urge such a strict approach. This Court does not agree. The Court is more favorably impressed with the reasoning and holding by Judge Dierker in the May 6, 1988, ruling from the 22nd Circuit in the case of *McPherson Development Corp. v. Bass,* wherein the term "freeholder" was given another meaning than one rooted in property law, that is one of public law; that it is an ambiguous term. It should be given broad meaning and not as one of limitation to invalidate and hold as unconstitutional the portions of the Missouri and United States Constitutions herein under consideration. The Missouri Constitution should be construed to give it a broad meaning, *Roberts v. McNary,* 636 S.W.2d 332, 335, and upheld if possible, *Simpson v. Kilcher,* S.Ct. #69537 and *Wilson v. Kuenzi,* S.Ct. 69592, both decided April 19, 1988 S.W.2d . The Constitution should be interpreted in context with all other provisions and the public policy of the State. *Stemmler v. Einstein,* 297 S.W.2d 467. It is not for this Court to usurp the powers of the people of this State who approved the Constitution with the word "freeholder" not once but several times. It is for them to proscribe who may serve on the board and provide for their qualifications. If the people believe it unwise in the future to extend or limit the members' qualifications they may do so by proper means. Any plan if adopted by the voters would affect property owners, non-property owners, voters, non-voters, taxpayers and non-taxpayers alike.

There is no contention in this case that restrictions on those eligible to vote on any proposed plan by the board as involved for example in *In re. Ext. of Bounderies of Glaize Creek,* 574 S.W.2d 357, where the Supreme Court struck down restrictions permitting voters to be property owners. Any plan proposed by the board of freeholders must be approved by voters in the City and County of St. Louis. They have the ultimate determination of any change in government. Here we are limited to qualifications only of the make-up of the board. This Court is not persuaded that the word "freeholder" is describing the board is determinative so as to render the same unconstitutional. Defendants here rely on the cases of *Turner v. Fouche,* 396 U.S.346 (1970), and *Chappell v. Greater Baton Rouge Airport District,* 431 U.S. 159 (1977). These held that real property ownership cannot be used as criteria for the appointing of real property owners to a school board or airport commission. The holding of these cases are limited to their facts. The U.S. Supreme Court stated that it did not exclude "the possibility that under other circumstances might present themselves in which property qualifications for office could survive constitutional scrutiny. . ." They are distinguishable from the case at bar. While ownership of real property may have no rational basis to qualifications of persons who make decisions on those boards it could on board under consideration. Such qualification could enhance the work on the board of freeholders as one critical question is

change of bounderies between the City and County. However, this Court as stated, does not believe the board's qualifications so limit their status. Such criteria as residency and age have been upheld for government officials. See for example *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976); *Sununu v. Stark,* 420 U.S. 948 (1975) U.S. Constitution Art. I, Sec. 2, 3; Art. II, Sec. 1. The equal protection argument by defendants could be carried to extremes. In addition to arguing that non-real property owners were excluded from membership on the board it could also be alleged that Illinois residents are excluded. They too may be affected by the plan if adopted as many pay taxes to the City and County. This is a specious stretching of board member's qualifications.

Since the only limitation of membership on the board of freeholders is they be electors, designation of the title cannot be used as the basis to overturn their selection.

JUDGMENT

Motions for Summary Judgment supported by transcripts, stipulations of fact, exhibits and affidavits having been filed or joined in by all parties; and the parties having waived the right to present additional evidence at the trial of this action; and the Court finding that no genuine issue of material fact exists and that the matter is appropriate for disposition; and the trial of this action and the hearing on the various Motion for Summary Judgment having been held on May 16, 1988; and Plaintiff Wayne L. Millsap and Defendants Robert J. Quinn, Jr. and Patricia J. Kampsen having appeared in person and by their attorneys of record; and this Court, having heard the arguments of counsel and having reviewed the pleadings, memos of law, transcripts, stipulations of fact, evidence, exhibits and admissions of the parties, it is:

ORDERED, ADJUDGED AND DECREED that pursuant to the provisions of Missouri Supreme Court Rule 52.08, this action may be maintained as a class action as provided in Rules 52.08(b)(1) and (b)(2), said class consisting of all residents of the State of Missouri who are electors but who do not own an interest in real property; and that Defendants, Robert J. Quinn, Jr. and Patricia J. Kampsen, are appropriate class representatives and have fairly and adequately represented the interests of the class in this action;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the provision of Article VI, Sections 30(a) and 30(b) of the Constitution of the State of Missouri are hereby declared to be valid and in compliance with the Constitution of the United States and the Constitution of the State of Missouri;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs, Joseph S. Balcer, Robert L. Bannister, Sandra Hasser Bennett, Allen S. Boston, Claude Brown, William C. Cocos, Jr., Jo Curran, Thomas P. Dunne, Catherine Frances Emerson, Gretta Forrester, Albert H. Hamel,

William J. Harrison, Wayne L. Millsap, J. P. Morgan, Catherine Rea, Daniel L. Schlafly, Henry S. Stolar, Lucille Walton and Margaret Bush Wilson, are the duly constituted members of the St. Louis City-County Board of Freeholders (the Board); the petition to establish the Board is valid and fully complies with the requirements of the Constitution of the State of Missouri and The Constitution of the United States; the Board is validly and constitutionally appointed in accordance with the Constitution of the State of Missouri and the Constitution of the United States; the general concepts of a plan which has been agreed upon by the Board are in compliance with the Constitution of the United States and the Constitution of the State of Missouri; and the Board has full power and authority to implement its mandate pursuant to Article VI, Sections 30(a) and 30(b) of the Constitution of the State of Missouri; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs Motions for Summary Judgment are hereby GRANTED; Defendants' Motions for Summary Judgment are hereby DENIED; Defendants' Counterclaim (designated Cross-Petition) is DISMISSED with prejudice; and Defendants' request for attorneys' fees and expenses pursuant to 42 U.S.C. Section 1983, *et seq.* is hereby DENIED.

The parties shall bear their own costs.

SO ORDERED:

/s/ Arthur Litz, Circuit Judge
Dated: May 24, 1988

cc: All Counsel of Record

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

No. 70688

Wayne L. Millsap, et al.,
Respondents

vs.

Robert J. Quinn, Jr., et al.,
Appellants

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

(Filed Dec. 16, 1988)

Notice is hereby given that Appellants Robert J. Quinn Jr. and Patricia J. Kampsen, individually and on behalf of the class of persons for whom they have been designated as representatives, hereby appeal the judgment and decision of the Supreme Court of Missouri entered in the above-styled cause on September 23, 1988 to the Supreme Court of the United States.

This appeal is taken pursuant to the authority of § 1257(2) of Title 28 of the United States Code in that the decision of the Supreme Court of Missouri is a final judgment rendered by the highest court of the State of Missouri and this cause draws in question the validity of Sections 30(a) and (b) of Article VI of the Constitution of the State of Missouri on the grounds that said Sections are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the decision from which this appeal is taken was in favor of the validity of said Sections. *28 U.S.C.* §1257(2).

Appellants further note that the final decision of the Supreme Court of Missouri was rendered on September 23, 1988, which date was less than ninety (90) days after June 27, 1988. *Pub. L. 100-352, §§ 3, 7, June 27, 1988, 102 Stat. 662, 664.*

UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE

Kevin M. O'Keefe, MBE #23381
906 Olive Street, Suite 300
St. Louis, Missouri 63101
(314) 621-9550

AND

JESS W. ULLOM. Esq.

Jess W. Ullom, MBE #24679
222 South Central, Suite 900
Clayton, Missouri 63105
(314) 863-8484

Attorneys for Appellants

By: /s/ Kevin M. O'Keefe/
Jess W. Ullom

Certificate of Service

The undersigned hereby certifies that he is a member of the Bar of the Supreme Court of the United States and that one copy of the foregoing Notice of Appeal was mailed to counsel for each of the parties to the proceedings in the Supreme Court of Missouri by depositing a copy thereof, first class postage prepaid, in the United States mail addressed to counsel of record for each said party at the post office address of such counsel as hereinafter stated, on the 15th day of December, 1988:

Attorney General William L. Webster
Atty's. Simon B. Buckner
Peter Lumaghi
Assistant Attorneys General
State of Missouri
Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111

Attorneys for Respondents State of Missouri
and Governor John D. Ashcroft

Atty. Thomas W. Wherle
St. Louis County Counselor,
Atty. Andrew J. Minardi
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105

Attorneys for Respondent County Executive
Gene McNary

Atty. James L. Wilson
St. Louis City Counselor
Atty. Eugene P. Freeman
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103

Attorney for Respondent Mayor
Vincent C. Schoemehl, Jr.

Atty's. Kenneth F. Teasdale
Thomas Cummings, Thomas B. Weaver,
Jordan B. Cherrick,
Armstrong, Teasdale, Kramer, Vaughan & Schlafly
Attorneys at Law
611 Olive Street, Suite 1900
St. Louis, Missouri 63101

Attorneys for Respondents
Members of the Board of Freeholders

/s/ Kevin M. O'Keefe

APPENDIX D

Art. 6, § 30(a) Constitution of 1945

City and County of St. Louis

§ 30(a). Powers conferred with respect to intergovernmental relations — procedure for selection of board of freeholders

Section 30(a). The people of the city of St. Louis and the people of the county of St. Louis shall have power (1) to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or, (2) to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or, (3) to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or, (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or, (5) to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county. The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. Upon the filing with the officials in general charge of elections in the city of a petition proposing the exercise of the powers hereby granted, signed by registered voters of the city in such number as shall equal three per cent of the total vote cast in the city at the last general election for governor, and the certification thereof by the election officials to the mayor, and to the governor, then, within ten days after the certification the mayor shall, with the approval of a majority of the board of

aldermen, appoint the city's nine members of the board, not more than five of whom shall be members of or affiliated with the same political party. Each member so appointed shall be given a certificate certifying his appointment signed by the mayor and attested by the seal of the city. Upon the filing with the officials in general charge of elections in the county of a similar petition signed by registered voters of the county, in such number as shall equal three per cent of the total vote cast in the county at the last general election for governor, and the certification thereof by the county election officials to the county supervisor of the county and to the governor, within ten days after the certification, the county supervisor shall, with the approval of a majority of the county council, appoint the county's nine members of the board, not more than five of whom shall be members of or affiliated with the same political party. Each member so appointed shall be given a certificate of his appointment signed by the county supervisor and attested by the seal of the county.

Amendment adopted Nov. 8, 1966.

§ 30(b). Appointment of member by governor — meetings of board — vacancies — compensation and reimbursement of members — preparation of plan — taxation of real estate affected — submission at special elections — effect of adoption — certification and recordation — judicial notice

Section 30(b). Upon certification of the filing of such similar petitions by the officials in general charge of elections of the city and county, the governor shall appoint one member of the board who shall be a resident of the state, but shall not reside in either the city or the county, who shall be given a certificate of his appointment signed by the governor and attested by the seal of the state. The freeholders of the city and county shall fix reasonable compensation and expenses for the freeholder appointed by the governor and the cost shall be paid equally by the city and county. The appointment of the board shall be completed within thirty days after the certification of the filing of the petition, and at ten o'clock on the second Monday after their appointment the members of the board shall meet in the

chamber of the board of aldermen in the city hall of the city and shall proceed with the discharge of their duties, and shall meet at such other times and places as shall be agreed upon. On the death, resignation or inability of any member of the board to serve, the appointing authority shall select the successor. The board shall prepare and propose a plan for the execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder. The members of the board shall receive no compensation for their services as members, but the necessary expenses of the board shall be paid one-half by the county and one-half by the city on vouchers signed by the chairman of the board. The plan shall be signed in duplicate by the board or a majority thereof, and one copy shall be returned to the officials having general charge of elections in the city, and the other to such officials in the county, within one year after the appointment of the board. Said election officials shall cause separate elections to be held in the city and county, on the day fixed by the freeholders, at which the plan shall be submitted to the qualified voters of the city and county separately. The elections shall not be less than ninety days after the filing of the plan with said officials, and not on or within seventy days of any state or county primary or general election day in the city or county. The plan shall provide for the assessment and taxation or real estate in accordance with the use to which it is being put at the time of the assessment, whether agricultural, industrial or other use, giving due regard to the other provisions of this constitution. If a majority of the qualified electors of the city voting thereon, and a majority of the qualified electors of the county voting thereon at the separate elections shall vote for the plan, then, at such time as shall be prescribed therein, the same shall become the organic law of the territory therein defined, and shall take the place of and supersede all laws, charter provisions and ordinances inconsistent therewith relating to said territory. If the plan be adopted, copies thereof, certified to by said election officials of the city and county, shall be deposited in the office of the secretary of state and recorded in the office of the recorder of deeds for the city, and in the office of the recorder of deeds of the present county, and the courts of this state shall take judicial notice thereof.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Robert J. Quinn, Jr. and Patricia J. Kampsen, et al.,
Plaintiffs,

v.

The State of Missouri, et al..
Defendants.

No. 87-4492-CV-C-5

TEMPORARY RESTRAINING ORDER

This cause having been presented to the Court on Plaintiffs' verified First Amended Complaint and Plaintiffs' Motion for Temporary Restraining Order and Affidavit in Support thereof; Plaintiffs having submitted verification that notice of these proceedings was afforded to all Defendants and their respective counsel; and Plaintiffs appearing by counsel and counsel for Defendants also appearing, and all parties present having been afforded an opportunity to be heard, it appears to the Court that Plaintiffs are in immediate danger of suffering irreparable injury if Defendants are not restrained and enjoined as prayed by Plaintiffs, in that Plaintiffs' constitutional right to equal protection of law and the ability of this Court to provide full and adequate relief are both jeopardized if a temporary restraining order is not issued prior to the time that a hearing on a preliminary injunction or other relief can be held, now therefore,

IT IS HEREBY ORDERED that:

1. Defendants and each of them, and any officers, agents, employees, successors, attorneys or agents thereof, and any other person, persons or organizations in active concert or participation with said Defendants, are hereby enjoined, restrained and prohibited as follows:

A. from expending any public funds incurred in support of the activities of the Board of Freeholders, from or after the entry of this order, of the City of St. Louis and St. Louis County now existing and organized pursuant to §§ 30(a) and (b) of Art. VI of the Constitution of the State of Missouri; and

B. from exercising or attempting to exercise any of the power or authority invested in a Board of Freeholders pursuant to §§ 30(a) and (b) of Art. VI of the Constitution of the State of Missouri, and, in particular, from preparing or filing with the election authorities of the City of St. Louis and St. Louis County, Missouri, any "plan" pursuant to the said constitutional provision; and

C. as to Defendants Ashcroft, McNary and Schoemehl and their successors in office, from appointing any new, additional or replacement members to the present or any other Board of Freeholders;

all pending further order of the Court.

2. Plaintiffs' request for a preliminary and permanent injunction will be heard by this Court on February 17, 1988, at 9:00 a.m. at the United States Courthouse in Jefferson City, Missouri.

3. Plaintiffs shall give bond in the sum of $250.00.

4. A copy of this Order shall be served on all Defendants.

/s/ Scott O. Wright
United States District Judge

January 25, 1988.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Robert J. Quinn, Jr., et al.,
Appellees,

v.

The State of Missouri, et al.,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri

No: 88-1146

Appellants' motion for a stay of implementation of the district court's Temporary Restraining Order which was entered on January 25, 1988, has been considered by the Court and is hereby granted. The Temporary Restraining Order is stayed until further order of this Court. Appellants' motion to expedite this appeal is also granted. An expedited briefing schedule will be set at a later date. The appellee is directed to file a response to the stay request by Monday, February 1, 1988.

January 27, 1988

Order Entered Under Rule 5(a):
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Robert J. Quinn, Jr., and Patricia J. Kampsen,
individually and on behalf of all other similarly situated
non-freeholder electors of St. Louis County, Missouri and of
the City of St. Louis, Missouri,
Appellees,

v.

The State of Missouri; John D. Ashcroft, Governor of Missouri; Gene McNary, County Executive of St. Louis County, Missouri; Vincent C. Schoemehl, Jr., Mayor of the City of St. Louis, and Joseph S. Balcer, Robert L. Bannister, Sandra H. Bennett, Allen S. Boston, Claude Brown, William G. Cocos, Jr., Jo Curran; Thomas P. Dunne, C. Fran Emerson, Gretta Forrester, Albert H. Hamel, William J. Harrison, Wayne L. Millsap, Chairman, J.P. Morgan, Catherine Rea, Daniel Schlafly, Henry S. Stolar, Lucille Walton and Margaret Bush Wilson, Comprising the St. Louis City and County Board of Freeholders,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri

No. 88-1146

Submitted: February 10, 1988
Filed: February 11, 1988

Before McMillian, Arnold and Fagg, Circuit Judges.

PER CURIAM.

Appellee Robert J. Quinn, Jr. represents a class of persons who do not own real property in a class action suit alleging that Art. VI, §§ 30(a) and (b) of the Constitution of the State of

Missouri violates various provisions of the United States Constitution because it prevents the members of the class from being eligible to serve on the St. Louis Board of Freeholders (the Board). Quinn filed his original complaint on November 10, 1987, seeking declaratory relief. Quinn filed an amended complaint on January 21, 1988, which added several defendants and sought injunctive relief to enjoin any further actions of the Board. On January 25, 1988, the district court granted Quinn's request for a temporary restraining order (TRO), while denying the State of Missouri's motions for abstention or transfer or both. This court stayed the TRO on January 27, 1988, pending an expedited appeal by the State. For reversal, the State argues (1) that the district court should have abstained, and (2) that the district court abused its discretion in granting TRO.

Quinn argues as a threshold matter that this court is without jurisdiction to hear the State's appeal from the district court's TRO. The law is, however, that where a TRO exceeds the ten-day limit provided in Fed. R. Civ. P. 65(b), and has the practical effect of a preliminary injunction, the appellate court may treat it as a preliminary injunction and exercise jurisdiction under 28 U.S.C. § 1292(a)(1). *Sampson v. Murray*, 415 U.S. 61, 86-87 and n. 58 (1974); *Edudata Corp. v. Scientific Computers, Inc.*, 746 F.2d 429, 430 (8th Cir. 1984) (per curiam); *Waste Management, Inc. v. Deffenbaugh*, 534 F.2d 126, 129 (8th Cir. 1976). While Quinn argues that the State consented to the extension of the TRO, the State clearly objected to the issuance of any such order on the ground that no threat of an irreparable injury had been shown. Though perhaps this was not a specific objection to the duration of the TRO, the State certainly did not consent. *See Connell v. Dulien Steel Products*, 240 F.2d 414, 417-18 (5th Cir. 1957). Furthermore, "[a]n appeal from an order granting or refusing injunctive relief pursuant to 28 U.S.C. § 1292(a)(1) presents for appellate review the entire order, not merely the propriety of injunctive relief." *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 73-74 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976). The TRO at issue was granted by the district court on

January 25, 1988, to extend in force until a hearing on a preliminary and permanent injunction scheduled for February 17th, a total of twenty-four days. As such, it will be treated as a preliminary injunction within the meaning of 28 U.S.C. § 1292 (a)(1). The abstention issue is also within this court's jurisdiction as part of the appeal from the TRO.

At this time, however, we do not decide the abstention question because at oral argument before this court, counsel for the State implied, if not stated, that the State intended to file a parallel action in the Missouri State Courts. If this should happen, the posture of this case for abstention purposes might be different from what it is now, and the parallel state procedings could have an impact on the resolution of this issue. If the district court is notified that such a parallel suit has been filed, we leave the abstention question to be decided by the district court in the first instance.

We find no abuse of discretion in the district court's entry of a TRO, and affirm that order, as modified herein. Because we conclude that restricting the Board from meeting and planning is a substantial interference with local government processes, we modify the TRO and direct the Board not to take any final action or file any proposed plan of reorganization until the district court has ruled on the merits of Quinn's complaint. Until the district court has rendered its decision, the Board is free to continue to meet and to plan a proposal of reorganization.

The emergency stay of the TRO is hereby dissolved, that order is reinstated as modified herein, and the case is remanded to the district court for further proceedings. Mandate to issue forthwith.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 87-4492-CV-C-5

Robert J. Quinn, Jr. and Patricia J. Kampsen,
Plaintiffs,

vs.

The State Of Missouri, et al.,
Defendants.

ORDER

This is a class action for declaratory and injunctive relief in which plaintiffs challenge the constitutionality under the United States Constitution of Article VI, §§ 30(a) and 30(b) of the Missouri Constitution of 1945, as amended. These sections provide for the selection and operation of a board of freeholders ("Board") to propose a plan for intergovernmental relations between St. Louis County and the City of St. Louis, and for the submission of such plan to the electorate of those political subdivisions. This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and § 1343(3).

The named plaintiffs include Robert J. Quinn and Patricia J. Kampsen. Both plaintiffs are residents of St. Louis County, Missouri, and are taxpayers, registered voters and electors of St. Louis County, and non-freeholders, owning no real property. They bring this case on their own behalf and on behalf of the entire class consisting of resident taxpayers, electors and non-freeholders of St. Louis County, Missouri, and of the City of St. Louis, Missouri, and consisting of non-freeholder residents of the State of Missouri not residing in either the City of St. Louis or St. Louis County.

The State of Missouri has been named as a defendant because §§ 30(a) and (b) is a state constitutional enactment, adopted on November 4, 1924. Section 30(a) was amended November 8, 1966.

Defendant John D. Ashcroft is Governor of the State of Missouri; Defendant Gene McNary is the County Executive of St. Louis County; and Defendant Vincent C. Shoemehl, Jr. is the Mayor of the City of St. Louis. These defendants are the authorities responsible for appointing members to the board of freeholders, organized pursuant to §§ 30(a) and (b).

Defendants Joseph C. Balcer, Robert L. Bannister, Sandra H. Bennett, Alan S. Boston, Claude Brown, William G. Cocos, Jr., Jo Curran, Thomas P. Dunne, C. Fran Emerson, Gretta Forrester, Albert H. Hamel, William J. Harrison, Wayne L. Millsap, J. P. Morgan, Catherine Rea, Daniel Schlafly, Henry S. Stolar, Lucille Walton and Margaret Bush Wilson are members of the board of freeholders ("the Board").

This action was originally filed on November 10, 1987, and amended on January 21, 1988, to name the appointing authorities and board members as additional defendants. Plaintiffs also voluntarily dismissed William L. Webster, Attorney General of the State of Missouri, as a defendant on January 21, 1988. On January 25, 1988, this Court issued a temporary restraining order which was affirmed and modified by the United States Court of Appeals for the Eighth Circuit on February 11, 1988. The modified restraining order was continued after a full trial on the merits on February 17, 1988.

I. CLASS CERTIFICATION AND STANDING

Plaintiffs seek to have this action certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Court first concludes that all prerequisites set forth in Rule 23(a) have been met.[1]

In evaluating whether the numerosity requirement is met, the Court considers the number of persons in a proposed class, the nature of the action and the inconvenience of trying individual suits. The Court finds that the number of non-freeholder taxpayer electors who reside in the City of St. Louis, St. Louis County, and the State of Missouri is sufficiently numerous. No arbitrary rules regarding the necessary size of classes have been established. *Paxton v. Union National Bank*, 688 F.2d 552, 559 (8th Cir. 1982).

The commonality requisite set forth in Rule 23(a) does not demand that every question of law or fact be common to every member of the class. *Id.* at 561. Rather, the issues are sufficiently common "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Id.*

Similarly, the claims of the representative parties are typical of those of the class if they emanate from the same "legal theory, remedial theory or offense" as those they represent. *U.S. Fidelity & Guaranty v. Lord*, 585 F.2d 860, 870 (8th Cir. 1978). Here, the necessary commonality and typicality exist where the challenged constitutional provision requires that one must be a freeholder, or real property owner, to be appointed as a member of the board of freeholders. All class members, as non-freeholders, would be automatically excluded, even if they were otherwise qualified.

The fourth component of Rule 23(a) focuses on whether the class representatives have common interests with the class members and would vigorously prosecute the interests of the class through qualified counsel. *Paxton*, 688 F.2d at 562-63. Here, there are no apparent conflicts with the interests of the named plaintiffs and the rest of the class within the scope of this litigation.

Further, this is the type of case appropriate for a 23(b)(2) class since the defendants have acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief would be the appropriate remedy.[2] Hence, plaintiffs are properly named representatives who may act on behalf of the following class, which the Court now certifies:

> Resident taxpayers, electors and non-freeholders of St. Louis County, Missouri, and of the City of St. Louis, Missouri and consisting of non-freeholder residents of the

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[1] Rule 23(a) sets out the prerequisites to a class action:

> One or more members of a class may sue or be sued as representaive parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

[2] Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

State of Missouri not residing in either the City of St. Louis or St. Louis County.'

In addition to opposing class certification, Defendant McNary has also challenged plaintiffs' standing to sue, alleging that "[t]here is no case or controversy for this Court to decide and any proceeding by this Court would be contrary to Article III of the United States Constitution." Supplemental Answer of Defendant Gene McNary to Plaintiffs' Second Amendment by Interlineation of First Amended Class Action Complaint. This answer was filed February 25, 1988. At the hearing on February 17, 1988, this same issue was raised by counsel for the Board.

However, previous to these dates, these defendants had filed as plaintiffs in a parallel case in State Court on February 16, 1988, which involves identical parties and addresses the same federal question as in this suit. In the petition in the Circuit Court of St. Louis County, the following is alleged:

> 20. A controversy therefore presently exist [sic] between Plaintiffs and Defendants as to whether the Board is a constitutionally constituted body and whether Plaintiff Board Members were properly appointed and whether the Plaintiff Board Members can exercise the mandate given to them by the people of the County of St. Louis and City of St. Louis.
>
> 21. The interests of Plaintiffs and Defendants are in fact adverse, the parties hereto have legally protectable interests involved, and it is timely that a judicial determination be made of the questions involved.

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[1] Although defendants have opposed class certification, the Court notes that in the petition filed by all defendants in the Circuit Court of the County of St. Louis, No. 572794, on February 16, 1988, Robert Quinn and Patricia Kampsen are named as defendants "Individually, and on behalf of all other similarly situated individuals." See also ¶ 8 of the State complaint.

These averments certainly rebut any objections to judiciability. Under *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 2873 (1976), plaintiffs must allege an "injury in fact, that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Article III jurisdiction." In order to have standing:

> (1) Plaintiff must allege an actual or threatened injury as a result of the conduct of the defendant,
>
> (2) the injury alleged by plaintiff must be fairly traceable to the action of the defendant that is challenged in the lawsuit, and
>
> (3) the injury alleged by plaintiff must be likely to be redressed by a favorable decision of the court.

Belles v. Schweiker, 720 F.2d 509, 513 (8th Cir. 1983), *citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758 (1982).

Moreover, in *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970), the Supreme Court explicitly upheld a class of nonfreeholders' standing to challenge a similar restriction for membership on a school board, even though no allegation was made that the representative nonfreeholder wished to serve on the board or that he was harmed in any other way by the freeholder limitation. Here, Article III requirements are satisfied.

II. VENUE

Defendant McNary's contention that venue in this action does not lie in the Western District of Missouri also must be rejected.

Title 28 U.S.C. § 1391(b) states that "[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may

be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." However, in civil actions not of a local nature where, as here, all defendants reside within the state but in different districts, § 1392(a) permits venue in any district where one or more defendants reside. This provision is satisfied where plaintiffs challenge the constitutionality of a state constitutional provision and defendant John Ashcroft, the Governor, and defendant Morgan, a board member, reside in the Western District of Missouri.

The Court is not persuaded by defendant McNary's claim that this is a "local action" that must be brought in the Eastern District. The challenged law is a provision in the State Constitution, not a local ordinance or city charter. Section 30 limits service on the Board to freeholders and specifically provides for the appointment of one freeholder who does *not* reside in either the City or County of St. Louis. This potential board member may reside in any other part of the state. Therefore, venue is proper in this district.

Regardless of the propriety of venue here, defendants urged transfer of this case to the District Court for the Eastern District of Missouri, Eastern Division, pursuant to 28 U.S.C. § 1404(a).

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." However, a decision whether to transfer a case lies within the discretion of the district court and the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947); *see also Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 353 (8th Cir. 1984). Here, the convenience of witnesses and parties and the interests of justice do not outweigh plaintiff's choice of forum. Thus, on January 25, 1988, this Court overruled the defendants' motion to transfer under § 1404(a).

III. ABSTENTION

A. Younger Abstention

Defendants argue that this Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), because a parallel state action was filed prior to the hearing on the motion for a preliminary and permanent injunction on February 17, 1988.

Under *Younger*, a federal court should not enjoin a state proceeding commenced after the filing of a federal case but prior to proceedings of substance on the merits in the federal suit. *Hicks v. Miranda*, 422 U.S. 332 (1975). *Younger* abstention is required if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The third requirement is clearly met: the declaratory judgment action filed in state court raises the same federal question as in this case, in addition to the State constitutional issue.

As to the first requirement, state proceedings may be considered "pending" for *Younger* abstention only when such activity is initiated "before any proceedings of substance on the merits have taken place in federal court," *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984), *quoting Hicks v. Miranda*, 422 U.S. 332, 349 (1975). "In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." *Hawaii Housing*, 467 U.S. at 238.

Here, the federal action in this Court was initiated and a temporary restraining order (TRO) was issued and appealed to the Eighth Circuit Court of Appeals prior to the filing of the state case. Treating the TRO as a preliminary injunction for jurisdictional purposes, the Eighth Circuit had even issued its *per curiam* opinion affirming yet modifying the TRO before the

state action was commenced. In fact, defendants did not file their complaint in the St. Louis Circuit Court until February 16, 1988, one day before the hearing on the preliminary injunction on February 17.

Although a denial of a TRO has not been considered "a proceeding of substance on the merits," *Hicks,* 422 U.S. at 338, *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 929 (1975), it may be that issuance of a TRO *is* a proceeding of substance on the merits. The Supreme Court left this possiblity open in *Midkiff,* 467 U.S. at 239, 104 S.Ct. at 2328. Certainly, when a preliminary injunction has been granted, the action has "proceeded well beyond the 'embryonic stage'. . . and considerations of economy, equity, and federalism counsel against *Younger* abstention at that point." *Id.* Nevertheless, it is not essential for this Court to decide whether this case involves a "pending" state proceeding that satisfies the first *Younger* requirement because the second *Younger* essential has not been met.

Younger abstention is not appropriate unless "the federal action would affect important state interests that are "vital to the operation of state government" and where "the state's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the states and the National Government." *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987) *quoting* (respectively) *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.,* 106 S.Ct. 2718, 2723 (1986), and *Pennzoil Co. v. Texaco, Inc.,* 107 S.Ct. 1519, 1526 (1987).

As in *Polykoff,* however, this case does not implicate the kind of state interest that warrants *Younger* abstention because the state action is "not the type of enforcement proceeding that has justified abstention under this doctrine." *Polykoff,* 816 F.2d at 1332. *See, e.g. Dayton Christian Schools, Inc.,* 106 S.Ct. at 2723-24 (state administrative civil rights law proceeding); *Middlesex,* 457 U.S. at 434-35, 102 S.Ct. at 2522-23 (attorney

disciplinary proceeding); *Moore v. Sims,* 442 U.S. 415, 423-35, 99 S.Ct. 2371, 2377-83 (1979) (child custody proceeding); *Juidice v. Vail,* 430 U.S. 327, 334-37, 97 S.Ct. 1211, 1216-18 (1977) (civil contempt proceeding); *Trainor v. Hernandez,* 431 U.S. 434, 444, 97 S.Ct. 1911, 1918 (1977) (enforcement of state welfare program); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 603-07, 95 S.Ct. 1200, 1207-09 (1975) (state nuisance action); *Younger,* 401 U.S. at 43-49, 91 S.Ct. at 750-53 (state criminal proceeding). Nor does the Supreme Court's ruling in *Pennzoil* require abstention here. In *Pennzoil,* comity mandated abstention because the federal case involved a challenge to the very "processes by which the State compels compliance with the judgment of its courts," an important state interest. *Pennzoil,* 107 S.Ct. at 1527.

Citing the above cases, the *Polykoff* court recognized that abstention was not required where the pending state action sought a *declaratory judgment* on the same federal issue as that involved in the federal action: whether Arizona's obscenity statute violated the federal constitution. "Considerations of comity do not counsel abstention under these circumstances." *Polykoff,* 816 F.2d at 1333 (citing *Playtime Theatres, Inc. v. City of Renton,* 748 F.2d 527, 533 (9th Cir. 1984) for the proposition that *Younger* abstention is inappropriate when the state action seeks declaratory relief rather than enforcement of a law).

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244 (1976). "Abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to State court would clearly serve an important countervailing interest." *Id.* Federal courts have an interest in the orderly functioning of the federal judicial system and in the preservation and exercise of their jurisdiction. "[P]rinciples of comity and federalism do not require that a federal court abandon jurisdiction it has properly

acquired simply because a similar suit is later filed in a state court. *Polykoff*, 816 F.2d at 1333, *quoting Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n. 8, 97 S.Ct. 1047, 1051 n. 8 (1977).

In this case, no state enforcement proceeding is pending. The parallel state action seeks a declaratory judgment on the same federal issue as that presented before this Court for declaratory judgment and injunction.[4] *See Polykoff*, 816 F.2d at 1333. Thus, *Younger* and its progeny have no application here.

B. Pullman Abstention

Defendants also argue that this Court should abstain from deciding plaintiffs' motion for a preliminary and permanent injunction under the doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643 (1941). *Pullman* abstention instructs "that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing*, 467 U.S. at 236, 104 S.Ct. at 2327. Thus, *Pullman* abstention presupposes two conditions: (1) there must be an unsettled issue of state law, and (2) there must be a possibility that the state law determination will moot the federal constitutional question raised. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1126 (8th Cir. 1982). However, in order for *Pullman* to apply, the state law must be "obviously susceptible of a limiting instruction" and "a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary" is insufficient. *Hawaii Housing*, 467 U.S. at 237, 104 S.Ct. at 2327 (emphasis in original). *Pullman* abstention is limited to uncertain questions of state law because, as noted earlier in the *Younger* discussion, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244.

[4] As will be noted later in the portion of this Order dealing with *Pullman* abstention, the issues in the two suits are essentially identical even though the state case *also* asks whether the Board of Freeholders is constitutionally appointed in accordance with the "equal rights and opportunities" clause of the Missouri Constitution, Article I, § 2.

Defendants contend that Article VI, Sections 30(a) and (b) of the Missouri Constitution present two unsettled questions of state law which should be interpreted by Missouri state courts to see if there is any basis for a federal constitutional challenge. First, defendants insist that it is not clear from the language of Section 30 whether one must be a "freeholder" to be a member of the board of freeholders. The second question depends on the first: if a Missouri court were to find that being a "freeholder" is a prerequisite to membership, does the term "freeholder" as used in Section 30 denote one who owns real property?

Neither question raises a real doubt as to the unambiguous language in Section 30. Section 30(a) provides for a

> *board of freeholders* consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. (emphasis supplied)

Section 30(b) adds that

> The *freeholders* of the city and county shall fix reasonable compensation and expenses for the *freeholder* appointed by the governor. . . . (emphasis supplied).

The challenged provisions of the State constitution are clear on their face that each member of the board shall be a freeholder. Defendants' interpretation that the term "freeholder" is a meaningless label is strained at best. While it is true that members must be electors, Section 30 clearly sets this forth as an *additional* requirement.

Similarly, the meaning of the term "freeholder" is certain, and not susceptible of being construed in a way that would

render it unnecessary to examine its impact under the equal protection provisions in the United States Constitution. This is true even though no Missouri decisions have defined the term "freeholder," as specifically used in Section 30.

The term "freeholder" has also been employed in Sections 18(g) and 32(b) of Article VI and in Article I, § 26, of the Missouri Constitution, in addition to its use more than forty-five times in Missouri statutes. Hence, the Missouri Supreme Court's construction of the term in these other contexts is instructive.

In *Shively v. Lankford*, 174 Mo. 535, 74 S.W. 835 (1903), the Missouri Supreme Court defined the word "freeholder" as used in the predecessor to the current constitution:

> That one may be a freeholder and not a householder, or a householder and not a freeholder, seems to be too plain for argument. "Householder" refers to the civil status of a person, not his property, and a man may be a householder without owning real estate, or any interest therein, whereas a freeholder is one who owns "a freehold estate; that is, an estate in lands, tenements, or hereditaments of an indeterminate duration, other than an estate at will or by sufferance, as in fee simple, fee tail or for life, or durante viduitate, or during coverture, etc." [citations omitted].

Id., 74 S.W. at 838.

In Article I § 26, the Missouri Constitution provides for "a jury or board of commissioners of not less than three freeholders" to determine the compensation for property taken by eminent domain. In reference to a similar requirement in the Kansas City Charter, the Missouri Supreme Court allowed the trial record in such case to be supplemented to include voir dire material which showed that the jurors were asked "whether each of them had real estate in his own name" in order to determine whether each juror qualified as a "freeholder."

"Freeholder" is defined in Mo.Rev.Stat. § 160.011(3) (1986) as "any person who has an estate in land which may be inherited or an estate in land for life or for an indeterminate period, including any tenant by the entireties," for purposes of twelve chapters of the statutes dealing with education and libraries. Of course, this is consistent with its use in the Missouri Constitution and early interpretations of the term by the Missouri Supreme Court.

Missouri courts employ the same rules in construction of constitutional provisions as those used in statutory interpretation, even though the constitutional terms are given a broader construction due to their more permanent nature. *Roberts v. McNary*, 636 S.W.2d 332, 335 (Mo. 1982) (en banc), citing *Boone County Court v. State of Missouri*, 631 S.W.2d 321, 325 (Mo. 1982) (en banc). Still, "[c]rucial words must be viewed in context and it must be assumed that words used were not intended to be meaningless." *Roberts*, 636 S.W.2d at 335. In ascribing meaning to the specific words used in the State constitution, the *Roberts* court further elaborated:

> This Court has recognized that in construction of constitutional provisions, it should undertake to ascribe to words the meaning which the people understood them to have when they adopted the provision. "The framers of the Constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they said.' This is but saying that no forced or unnatural construction is to be put upon their language." [citations omitted].

Id. Defendants' suggestion that Section 30 does not require members to be freeholders or that "freeholder" does not refer to an owner of real property is an attempt to place a forced and unnatural construction on this constitutional provision.

> The meaning of the words in the provision, as conveyed to the voters is presumed to be their natural and ordinary

> meaning. The ordinary and commonly understood meaning is derived from the dictionary. Moreover, the grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed. Of course, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole. [citations omitted].

Id.

Black's Law Dictionary [5th Ed. 1979] defines "freeholder" as "One having title to realty; either of inheritance or for life; either legal or equitable title."

Webster's New Twentieth Century Dictionary defines "freeholder" as "the possessor of a freehold," which is defined as "the holding of a piece of land, an office, etc. for life or with the right to pass it on through inheritance."

The American Heritage Dictionary of the English Language (1981) states that a "freehold" is "an estate held in fee or for life."

The Missouri Supreme Court provides the following definition of a freehold estate in *Farmers Drainage District v. Sinclair Refining Co.*, 225 S.W.2d 745 (Mo. 1953):

> Estates or interests in land are of two kinds: Estates of freehold and estates of less than freehold. A freehold estate is defined as any estate of inheritance or for life in either a corporeal or incorporeal hereditament existing in or arising from real property of free tenure. Estates less than freehold are, as the term signifies, estates or interests in land less than a freehold, and are of three kinds: Estates for years, estates at will and estates of sufferance. [citations omitted].

Id. at 749. Finally, the United States Supreme Court and other federal courts have unambiguously recognized that a

"freeholder" requirement is one that restricts those who do not own real property. *E.g., Turner v. Fouche*, 396 U.S. 346 (1970).

Defendants have accused plaintiffs of "slavishly clinging to an ancient definition of common law property" in directing the Court to the foregoing authority which defines the term "freeholder." However, ironically, defendants themselves have cited to an outworn 1914 edition of Bouvier's Law Dictionary, Third Revision, which refers to a "freeholder" also as "one who is not a slave." Nor is the Court persuaded by the defendants' reliance on Mo.Rev.Stat. § 278.110 for the proposition that a freeholder may be defined as an "owner or custodian of livestock or poultry." This simply is *not* the "ordinary and commonly understood" meaning of the term.

More importantly, the standards actually applied by all three appointing authorities make it clear that appointment to the Board of Freeholders was restricted to persons owning real property. Stipulation of Facts, ¶s 15, 17, 19 and 21.

The petition which was filed with St. Louis County and City election officials in order for the Board to be appointed is labeled: "A PETITION to establish a board of St. Louis area *property owners (freeholders)*. . . ." (emphasis supplied). Stipulation of facts, ¶ 15 and accompanying Exhibit 1.

Even though Defendant McNary's *initial* list of desired qualifications did not include real property ownership, his Executive Assistant, William Skaggs, checked the County Assessor's records to determine that all of McNary's candidates were indeed real property owners after the County Counselor opined that this was an additional requirement. Stipulation of Facts, ¶s 15 and 17.

Defendant Schoemehl also did not *initially* consider ownership in real property in developing his list of potential candidates. However, when the City Counselor's office stated that this was a necessary qualification, Reverend Paul C. Reinert, a

potential candidate who does not own real estate, was dropped from consideration. Stipulation of Facts, ¶ 19.

Defendant Ashcroft included in his list of five criteria that the appointee have an ownership interest in real property. Stipulation of Facts, ¶ 21.

Thus, it is clear that facially and as applied, Article VI, § 30 of the Missouri Constitution requires that the membership on the board of freeholders is restricted to owners of real property (who are also electors). Therefore, the present case does not involve the board of freeholders is restricted to owners of real property (who are also electors). Therefore, the present case does not involve an ambiguous or unsettled question of state law, and for that reason *Pullman* abstention does not apply to this case.[5] *See National City Lines,* 687 F.2d at 1126.

C. Colorado River Abstention

Finally, this case does not fall within the narrow *Colorado River* abstention doctrine, which permits dismissal of the federal action in view of a concurrent state proceeding on the basis of a concern for judicial administration and efficiency. *Colorado River,* 424 U.S. at 817-18, 96 S.Ct. at 1246. As between state and federal courts, the general rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction." *Id.* Only "exceptional circumstances" permit

[5] The Court also rejects defendants' contention that abstention is required because Section 30 must be considered as consistent with the "equal protection" guarantees in Article I, § 2 of the State Constitution, which may obviate the federal constitutional question. "The [United States Supreme] Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions." *Hawaii Housing,* 104 S.Ct. at 2327, n. 4; *see also Guiney,* 833 F.2d at 1082 (if no clarifying interpretation of the questioned state law is required even if part of an integrated scheme of state constitutional provisions, there is no reason to abstain).

dismissal of the federal suit in such cases and are "considerably more limited than the circumstances appropriate for abstention." *Id.* The *Colorado River* court notes, *inter alia,* the relevant factors of the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation and the order in which jurisdiction was obtained by the concurrent forums. "Only the clearest of justifications will warrant dissmissal." *Id.,* 96 S.Ct. at 1247. Such "exceptional circumstances" are not present here. *See also Polykoff,* 816 F.2d at 1334.

IV. LACHES

Defendant McNary asserts that plaintiffs should be barred from seeking injunctive relief by the equitable doctrine of laches. Laches may be used to bar a lawsuit when the plaintiffs are guilty of (1) unreasonable and unexcusable delay, (2) which results in prejudice to the defendant. *Goodman v. McDonnell Douglas Corp.,* 606 F.2d 800, 804 (8th Cir. 1979). Laches is an affirmative defense and the burden of persuasion rests with the defendant. *Id.* at 806. Whether laches should apply is a matter within the sound discretion of the trial court and depends on the facts of each case. *Id.* at 804.

Application of the doctrine of laches is clearly inappropriate in this case. The members of the board of freeholders were appointed in September, 1987, and on October 5, 1987, announced their intention to file a final plan by mid-February, 1988. Plaintiffs were aware of this intent within several days and on November 9, 1988, plaintiffs' counsel informed the Board officers that he believed that the freeholder requirement violated the Equal Protection rights of non-freeholders under the United States Constitution. Stipulation of Facts, ¶s 26, 27, 30.

Plaintiffs filed their original complaint in this Court on November 10, 1987, seeking only declaratory relief and naming only William Webster and the State of Missouri as defendants. However, on the same day, defendant Wayne Millsap, the Chairman of the Board, was notified of the action. Two other

board members were informed of the suit on November 13. Stipulation of Facts, ¶s 31, 33, 34. Plaintiffs' counsel again addressed the Board on January 4, 1988, again questioning the legality of Article VI § 30. The amended complaint naming the board members and appointing authorities as defendants was filed on January 21, 1988, requesting injunctive and declaratory relief.

Thus, in support of his laches defense, Defendant McNary claims that plaintiffs "sat idly by as time and money were expended" by the Board. By failing to file suit for an injunction against these defendants until late January, defendants insist that they have been caused undue prejudice.

This argument, however, ignores another crucial fact: that is, defendants' own failure to obtain a declaration of the constitutionality of the composition of the Board. The Board retained legal counsel on September 28, 1987. In addition to defendants Ashcroft and McNary, six board members are attorneys. Stipulation of Facts, ¶s 42, 43. As stated earlier, defendant Millsap had actual notice that there was a constitutional challenge at least by November 10, 1987. Yet, defendants took no action to settle the question until filing suit in state court on February 16, 1988, the day before the scheduled hearing on the merits for a preliminary and permanent injunction.

It is well-settled that the equitable defense of laches can be raised only by one who comes into equity with clean hands. *See e.g., United States v. Weintraub,* 613 F.2d 612 (6th Cir. 1979). The defendants' own neglect in these cases negates any claim that they have been prejudiced. Plaintiffs' suit is not barred by laches.

V. CONSTITUTIONALITY OF §§ 30(a) and 30(b)

Plaintiff's challenge to the constitutionality of MO.CONST.art. VI, § 30(a) and (b) is two fold: First, it is claimed that these sections are unconstitutional on their face by

the imposition of an economic and social standard which bears no relevance to the competency of a person to serve on the board. Plaintiffs also state that the provisions were unconstitutionally applied, in that appointment to the board was actually limited to those who were ascertained to be owners of real property.

As discussed earlier in this opinion in the section on *Pullman* abstention, the Court has determined that the term "freeholder" unambiguously refers to one who owns real property. Thus, the constitutional analysis proceeds from that point.

The United States Supreme Court has directly addressed the constitutionality of requiring one who seeks public office to be a freeholder. In *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532 (1970), the Court held that a Georgia statute limiting membership of the school board to freeholders violated equal protection guarantees. Even judged against the traditional test for denial of equal protection, "such classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Id.* at 362, 90 S.Ct. at 541.

School board membership was not an elective office under the Georgia statutory scheme, just as the Board challenged here is not elected. But this did not limit the Court's ruling in *Fouche:*

> We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory classifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

Id., 396 U.S. at 362-63, 90 S.Ct. at 541.

This holding was reaffirmed in *Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159, 97 S.Ct. 2162 (1977), when the Supreme Court summarily struck down a Louisiana requirement that conditioned appointed membership on an airport commission on ownership of "property assessed" within that county.

In *Fouche,* the Supreme Court did not determine the proper level of scrutiny to be applied in equal protection cases involving candidates or appointments for public office, since it held that not even a rational basis existed for such a classification.

> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objections Georgia seeks to obtain by its 'freeholder' requirement, must be secured, in this instance at least, by means more finely tailored to achieve the desired goal. Without excluding the possibility that other circumstances might present themselves in which a property qualification for office holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination. (footnotes omitted).

Fouche, 396 U.S. at 364, 90 S.Ct. at 542.

Defendants argue that the freeholder requirement for the Board as described in § 30 should be considered one of the "other circumstances" alluded to in *Fouche,* in which a freeholder requirement could be upheld. In attempting to distinguish *Fouche* and *Chappelle* from the present case, the defendants advance as a rationale that

> [a]n individual's knowledge and experience gained from real property ownership . . . [has] a reasonable relationship to the issues decided by the Board of Freeholders. The Board must consider important issues which relate to real property, including the critical question of whether territorial boundaries of the City and County of St. Louis should be altered. . . .
>
> * * *
>
> An ownership of real property criteria for membership on the Board reflects a judgment that in consideration of the citizenry as a whole, real property owners will generally be better qualified to make the kinds of decisions which a Board must make.

The Court rejects this argument. While it is true that the Board *considers* real property issues, its actions and proposals are considerably broader than that. First, it is notable that the Board's operating funds are provided from general revenue funds of St. Louis County and the City of St. Louis, including taxes paid by members of the plaintiff class.[6] Stipulation of Facts, ¶s 28 and 29.

In *Woodward v. City of Deerfield Beach,* 538 F.2d 1081 (5th Cir. 1976), the court concluded that:

> Offices of general governmental responsibility can never be limited to freeholders. The exceptions, if any, must be limited to special purpose governments whose impact are *limited to real property interests.* (emphasis supplied).

Id. at 1083, *citing Salyer Land Co. v. Tulare Water District,* 410 U.S. 719, 93 S.Ct. 1224 (1973); *Associated Enterprises, Inc. v.*

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[6] $200,000.00 has been appropriated for Board operations, of which approximately $125,000.00 has been spent by January 25, 1988. Stipulation of Facts, ¶ 44.

Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237 (1973).

Art.VI § 30(a) provides for certain powers to be exercised by the vote of the people of the City and County of St. Louis "upon a plan prepared by a board of freeholders."[7] Five powers are enumerated:

> (1) To consolidate the territories and governments of the City and County into one political subdivision under the municipal government of the City of St. Louis; or
>
> (2) to extend the territorial boundaries of the County so as to embrace the territory within the City and to reorganize and consolidate the county governments of the City and County. . .; or
>
> (3) to enlarge the present or future limits of the City by annexing thereto part of the territory of the County, and to confer upon the City exclusive jurisdiction of the territory so annexed to the City; or
>
> (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or
>
> (5) to formulate and adopt *any other plan for the partial or complete government of all or any part of the City and County*. (emphasis supplied)

Section 30(b) directs that "[t]he board shall prepare and propose a plan for execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder."

Obviously, the scope of a plan which may be submitted by the Board under §§ 30(a) and (b) extends beyond the type of limited

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[7] The parties have stipulated that the estimated cost to the City and County of an election on any plan submitted by the Board would be at least $450,00.00.

real property issues which may justify a freeholder requirement for electing directors to specialized water districts as in *Salyer Land Co.*, 93 S.Ct. at 1228-30, and *Associated Enterprises*, 93 S.Ct. at 1238, where landowners primarily benefitted and were burdened by the establishment of such districts.

Moreover, the Board has actually "approved in general concept . . . components of a proposed plan" which impacts non-property owners considerably in providing for municipal finances. Plaintiff's Trial Exhibit No. 1 includes the following "component" which actually suggests a decrease in County property taxes:

> A plan for financing components of the proposed plan which includes a 1% earnings tax in St. Louis County, a rollback of the County property tax, a 6% nonresidential gross receipts tax on utilities in St. Louis County, a modified formula for sales tax revenue sharing among municipalities and financing provisions for the St. Louis City/County economic development district and metropolitan council.
>
> * * *
>
> The Board and staff are working on detailed development of the general concepts included in the plan.

Wayne L. Millsap, Chairman of the Board, verified at trial that this was the Board's tentative proposal.

The Court makes no judgment as to the worthiness of the ultimate goals behind such plan. However, it is clear that the Board's activities are not limited to issues of real property ownership.

Defendants' reliance on *Murphy v. Schilling*, 271 Ind. 44, 389 N.E.2d 314 (1979), and *McClendon v. Shelby Co.*, 404 So.2d 459 (Ala. Civ. App. 1985), is unpersuasive. In *Murphy*, the Indiana Supreme Court applied a rational basis test to uphold a

freeholder requirement on a township advisory board. *Murphy* is distinguishable because, there, real property taxes constituted 99.28% of all locally generated tax revenues. Nevertheless, this Court disagrees with the *Murphy* conclusion and rejects *McClendon* as dicta which is totally unsound (state appeals court approved as constitutional an Alabama statute which required county planning commissioners to be freeholders).

Finally, defendants cannot equate a property-ownership prerequisite with durational residency requirements. Even where stipulations for candidates' residency have been upheld as Constitutional, freeholder requirements have failed. *E.g., Woodward,* 538 F.2d at 1083-84.

Consequently, the freeholder requirement in Art. VI §§ 30(a) and (b) in the Missouri Constitution creates a wholly irrelevant arbitrary classification which does not serve as even a rational basis for any conceivable valid state objective. Under the reasoning of *Turner v. Fouche,* this is impermissible. *Cf. Williams v. Adams County Board of Elections Commissioners,* 608 F.Supp. 599 (D.C. Miss. 1985) (freeholder requirement for county board of supervisors contained in Mississippi state constitution violates equal protection). The Court thus concludes that Art. VI §§ 30(a) and (b) are unconstitutional, facially and as applied in appointing the Board, being in violation of the Equal Protection clause of the United States Constitution.

VI. Severability of the "freeholder" requirement and remedies

Defendants argue that the "freeholder" qualification in Sections 30(a) and (b) is severable from the remaining portions of the sections. In support of this position, the defendants cite to Mo.Rev.Stat. § 1.140 (1980), a statute declaring the portions stricken from Missouri statutes as unconstitutional are generally severable, unless, *inter alia* "the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* This provision, however, refers only to statutes and does not apply to the Missouri Constitution. Nor does the Missouri Constitution contain a severability clause.

In *State ex rel. St. Louis Firefighters Assoc. Local No. 73 v. Stemmler,* 479 S.W.2d 456 (Mo. 1972), the Missouri Supreme Court recognized that "[p]ublic offices and positions belong to the people and not to the officers upon whom they confer appointive power. The qualifications, tenure, and compensation thereof must be determined by the people or the people will lose control of their government. *This must be done by the representatives the people have authorized to act for them, unless the people themselves have determined these matters by writing them into the Constitution."* (emphasis in original) *Id.* at 460. In Sections 30(a) and (b), the people have chosen to write a "freeholder" requirement into, along with provisions for the Board's compensation ("no compensation"), tenure, and other qualifications. Even though the freeholder requirement does not pass Constitutional muster, the Court is unable to determine that this word can merely be excised from Sections 30(a) and (b) without altering the framers' and people's intent. These sections derive from Art. 9 § 26 of the Constitution of 1875, adopted in 1924. The "freeholder" requirement has remained intact as restated in the current sections of the Constitution of 1945, as amended in 1966. The term "freeholder" is not severable from the remainder of Sections 30(a) and (b). Accordingly, for the reasons stated above, it is hereby

ORDERED that the provisions in Article VI, §§ 30(a) and (b) of the Missouri Constitution are declared unconstitutional in violation of the Fourteenth Amendment to the United States Constitution. It is further

ORDERED that defendants Ashcroft, McNary and Shoemoehl, and their successors in office, are enjoined from appointing representatives to any board of freeholders organized pursuant to §§ 30(a) and (b). It is further

ORDERED that the defendant members of the board of freeholders are enjoined from exercising any power or authority invested in the Board pursuant to §§ 30(a) and (b). It is further

ORDERED that all defendants are enjoined from expending any public funds for the operation of the board of freeholders except as directly necessary to

(1) Wind up their affairs;

(2) Pay bills and salaries incurred prior to the date of this Order;

(3) Defend their interests on appeal from this Order;

(4) Pay any expenses, fees or costs as this Court may order.

It is further

ORDERED that the defendant Board commence immediately to wind up their affairs.

It is further

ORDERED that defendants pay all costs.

It is further

ORDERED that plaintiffs shall file any motion for attorneys' fees and expenses under 42 U.S.C. § 1988 within ten (10) days. The motion should be supported by affidavits for the attorneys' ordinary fees, and itemization of time expended and expenses incurred in this litigation. The defendants shall file any objections within ten (10) days after receiving a copy of plaintiffs' motion under § 1988.

/s/ SCOTT O. WRIGHT
United States District Judge

March 15, 1988.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Robert J. Quinn, Jr., et al.,
Appellees,

v.

The State of Missouri, et al.,
Appellants.

Appeal from the United States District Court for the Western District of Missouri

No. 88-1433

Submitted: April 26, 1988
Filed: April 26, 1988

Before McMillian, Fagg and Bowman, Circuit Judges.

ORDER

The judgment of the district court is reversed. The court finds that the district court should have abstained. The case may proceed to trial in the state court pursuant to the docket assignment. The opinion of the court will follow. Judge McMillian dissents from the entry of this order.

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

MOTION

No. 88-1048 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR., et al.,
Appellants,

vs.

WAYNE L. MILLSAP, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS

WILLIAM L. WEBSTER
Attorney General of Missouri
SIMEON B. BUCKNER
(Counsel of Record)
Assistant Attorney General
3100 Broadway - Suite 609
Kansas City, Missouri 64111
(816) 531-4207
Attorneys for Appellees
State of Missouri and
Governor John D. Ashcroft

January 20, 1989

(Other Counsel on Inside Front Cover)

R. L. Midkiff, Inc., 306 Cherry Street, Kansas City, Mo. 64106, (816) 421-1880

32 pp

THOMAS W. WEHRLE
St. Louis County Counselor
ANDREW J. MINARDI
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105
Attorneys for Appellee County Executive Gene McNary

JAMES L. WILSON
St. Louis City Counselor
EUGENE P. FREEMAN
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
Attorneys for Appellee Mayor Vincent C. Schoemehl, Jr.

KENNETH F. TRASDALE
THOMAS CUMMINGS
THOMAS B. WEAVER
JORDAN B. CHERRICK
ARMSTRONG, TRASDALE, KRAMER, VAUGHAN & SCHLAFLY
Attorneys at Law
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
Attorneys for Appellees Members of the Board of Freeholders

QUESTIONS PRESENTED

1. Does the determination of the Missouri courts that the Missouri Constitution does not require persons appointed to a particular board to own real property constitute an independent and adequate reason for a state court determination that Article VI, § 30 of the Missouri Constitution does not violate the equal protection clause of the fourteenth amendment to the United States Constitution, as asserted by the appellants?

2. Do federal courts have the power to review the structure through which the people of a state choose to exercise legislative power, so long as proposed legislation is submitted to a referendum of the electorate before becoming law?

PARTIES TO PROCEEDINGS BELOW

Appellees adopt the statement of the parties to the proceedings below contained in the Jurisdictional Statement.

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TABLE OF AUTHORITIES

Cases:

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No. 88-1048

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR., et al.,
Appellants,

vs.

WAYNE L. MILLSAP, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS

The appellees move this Court to dismiss the appeal herein both because the decisions of the courts of the State of Missouri are based on adequate and independent state grounds and because the questions presented in this appeal fail to raise a justiciable federal question.

STATUTORY PROVISION INVOLVED

This appeal raises a question as to the validity of Article VI, § 30 of the Missouri Constitution.

The constitutional provision, which is quoted accurately in Appendix D to the Jurisdictional Statement, establishes a procedure for creating a board ["Board of Freeholders" or "Board"] that is responsible for formu-

lating a ballot proposal to be presented to the people of the city and county of St. Louis. The constitutional provision calls for the governor, the county executive and the mayor to appoint a total of nineteen persons, who shall reside in and be electors from assorted geographical areas, to serve on the Board.

STATEMENT OF FACTS

The parties submitted the case on stipulated facts. Except as noted, appellees adopt the statement of facts contained in appellants' Jurisdictional Statement. The only apparent disagreements are two legal conclusions that appellants have asserted as facts.

First, in some places appellants state, correctly, that the Board proposes a plan that is placed on the ballot. *See, e.g.*, Jurisdictional Statement at 7. In other places, appellants give the Board powers less clearly enumerated in the Missouri Constitution. *See, e.g.*, Jurisdictional Statement at 23 ("the broad power to restructure government itself"). When reading either the Jurisdictional Statement or this motion, it is important to remember that the sole power of the Board is to put a question to the voters. The powers of the Board are defined in the Missouri Constitution and, hence, are matters of law. The full text of the relevant sections appear in Appendix D of the Jurisdictional Statement.

Second, appellants assert that "Only those citizens of the state who are registered voters *and* owners of real property are allowed to serve on a Board of Freeholders." Jurisdictional Statement at 7. This "fact" is a misstatement of Missouri law. The trial court held

that any "elector" could be appointed to the Board. The Missouri Supreme Court observed that "electors" had been appointed to the Board. Appellants rely on a statement from the Missouri Supreme Court opinion that states: "We recognize membership on the Board of Freeholders was restricted to owners of real property." *Millsap v. Quinn*, 757 S.W.2d 591, 595 (Mo. banc 1988) (reprinted in Jurisdictional Statement at A-1, 7). The statement is a recognition of the stipulated fact that all persons appointed to the Board did, in fact, own real property. The court did not hold that the Missouri Constitution required any such restriction. The sentence in question does not refer to the Missouri Constitution. Nowhere within twelve paragraphs of the quoted sentence does the court refer to the Missouri Constitution. There is no reasonable way to read the opinion to mean that the Missouri Constitution requires members of the Board to own real property as a qualification for appointment to the Board. Again, this is a legal conclusion that appellants have asserted as fact.

Finally, as appellants note, the Eighth Circuit Court of Appeals determined that the federal judiciary should abstain from exercising jurisdiction over the questions presented in this litigation. The opinion which was to follow has yet to be issued. After the Missouri Supreme Court issued its opinion, the Eighth Circuit Court of Appeals directed the parties to file briefs discussing the effect, if any, the Missouri Supreme Court decision had upon the case that was still pending in the federal system. In the time that has elapsed since appellants filed their Jurisdictional Statement, the parties have submitted their briefs. The Eighth Circuit Court of Appeals has now ordered the parties to file reply briefs.

ARGUMENT

Appellants argue that Article VI, § 30 of the Missouri Constitution ["§ 30"] contravenes the federal constitution. The argument is based on two premises. First, § 30 limits eligibility to appointment to the St. Louis City/County Board of Freeholders ["Board of Freeholders" or "Board"] to persons who own real property. Second, such a limitation violates the equal protection clause of the fourteenth amendment to the United States Constitution. Appellees challenge both the power of this court to hear the case and each of the assumptions underlying appellants' argument.

This motion addresses three points. First, the state law interpretations of the Missouri Constitution show that it does not discriminate in the manner asserted. Because this state law question independently and adequately disposes of the dispute, there is no federal appellate jurisdiction in this Court. Second, because the United States Constitution gives Congress the exclusive power to review the form of state government, this Court may not review the means through which the State of Missouri chooses to put propositions on the ballot. Finally, appellees note that even if this Court were to decide both that the state procedures were subject to federal judicial review and that the Missouri Constitution should be construed as asserted by appellants, this state of affairs would not constitute a denial of equal protection of the laws of the United States, as guaranteed by the fourteenth amendment to the United States Constitution.

I. The Missouri Constitution does not discriminate against persons because of ownership of real property.

The major premise of appellants' case, that § 30 limits membership on the Board of Freeholders to owners of real property, involves a reading and construction of the Missouri Constitution. The meaning of the Missouri Constitution, of course, is a question of state law when considering the adequacy and independence of the state law basis for a decision, it is important to review the entire record, including the opinion of the trial court. *Fox Film Corporation v. Muller*, 296 U.S. 207, 208-09 (1935). A review of the trial court opinion shows that this question of state law was first considered in the Circuit Court of St. Louis County, Missouri[1] where the issue was resolved in favor of the appellees.

Because the parties had stipulated to the facts, the matter came before the court on cross-motions for summary judgment. The trial court found two state law reasons to avoid the federal constitutional question. The judge first looked to the text of the Missouri Constitution and found that the only explicit qualification for members of the Board was that they be electors. *Millsap v. Quinn*, No. 572794, slip op. (St. Louis County May 24, 1988) (reprinted in Jurisdictional Statement at A-9, 17). The only tie to the idea that someone need own real property, the court concluded, was the name of the Board. The court

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1. As appellants note in their Jurisdictional Statement, they first presented the question to the federal district court for the western district of Missouri. The Eighth Circuit Court of Appeals found that the federal trial court judge should abstain from exercising federal jurisdiction. On several occasions in the federal litigation, the attorney general offered to appoint the present appellants as special relators in a quo warranto action to take the question directly to the Missouri Supreme Court. When appellants did not act upon the offer, appellees initiated a declaratory judgment action in the state court.

decided that if the Board were legally constituted, merely giving it a misleading name would not negate the lawfulness of its creation.

Although it could have stopped at that point, the court elected to determine just what was in the name "freeholder." In the face of appellants' argument that the word should be understood in its property law sense, the court instead followed the lead of another Circuit Court judge[2] and held that when used in the Missouri Constitution, the word "freeholder" should be understood in a public law sense. In the context of public law, the court wrote, the word "freeholder" is an ambiguous term that imposes no additional limitation upon the word elector.[3]

Appellants' case is based on the premise that the Missouri Constitution creates two classes of citizens. The trial court found, for two reasons, that the premise was false. Having reached that conclusion, there was no need to consider whether, assuming the truth of the premise, one of the classes of citizens had lost a federal right.

The Missouri Supreme Court affirmed the decision of the trial court. The supreme court specifically noted

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2. The trial court followed the opinion of *McPherson Redevelopment Corporation v. Bass*, No. 882-0410, slip op. (St. Louis City May 6, 1988), which has been reproduced in the Appendix.

3. Although not suggested by the trial court, at common law all "electors" had to be "freeholders" who held a freehold of a certain minimum value. The word "freeholder" encompassed more people than did the class of electors. Accordingly, the word "freeholder" did not add any additional limitation over and above the term "elector." For a discussion of the qualifications of electors at common law, and a defense of requiring electors to own real property of a minimum value, see 1 W. Blackstone, Commentaries on the Laws of England 165-67 (1765). (Ownership of a single square inch of land, by the way, was not sufficient to meet the common law requirements. *Id.*)

that the appointing officials had appointed "electors" to the Board. If the state supreme court had stopped at this point, it would be very clear that this appeal presented no substantial federal question. Instead, the Missouri Supreme Court held, additionally, that the equal protection clause did not apply to governmental agencies having less than general governmental powers, a question that the parties had not thought to argue. It would be disingenuous to suggest that the applicability of the equal protection clause is not a federal question. Thus, the question presented in this motion to dismiss is whether the original finding, that the Missouri Constitution does not create two classes of citizens, as affirmed by the Missouri Supreme Court, is an independent and adequate basis for the state court decisions.

This Court has repeatedly held that the existence of an adequate state law basis for a decision will defeat the jurisdiction of this Court to review an independent federal question, even in the unlikely event that the state court has erroneously interpreted the federal law. *Herb v. Pitcairn*, 324 U.S. 117 (1945) (arising out of a St. Louis dispute). The difficulties facing litigants and this Court are how to determine the basis of the state court decision and to assess the independence and adequacy of that basis. Like the present case, *Klinger v. Missouri*, 13 Wall. (80 U.S.) 257 (1871) (yet another St. Louis controversy), offered this Court an aggravatedly confused record. At trial, the parties argued both state and federal issues. The trial court used both sets of issues to uphold the constitutionality of the challenged statute. The parties then argued both sets of issues to the Missouri Supreme Court, which omitted all reference to the federal questions in its decision. This Court found that there was an adequate and independent state law basis for its decision.

Before reaching that conclusion, however, this Court observed that "being found in the record, and arising out of the transactions at the trial . . . it is our duty to examine" the issues omitted from the Missouri Supreme Court opinion. *Id.* at 261. *Klinger* teaches that when a state appellate court affirms a lower court, this Court will examine each basis for the decision suggested in the trial court opinion.

The state law question, whether the Missouri Constitution creates two classes of citizens, must be reached before any court can decide the federal issue, whether any such classification is lawful. Because the state law issue must be resolved before reaching the federal issue, appellants' loss on the state question precludes review of the federal question. This Court has suggested, however, that when a state court makes a decision based on an arbitrary reading of state law, as a device to avoid federal review, such a decision is not adequate to sustain the decision. *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917). This problem arises when a state court fails to apply a state law even-handedly. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (discussing a state rule of procedure). Unlike *Hathorn*, in this case the only other relevant decision either party could find reached the identical conclusion: that the word "freeholder", as used in the Missouri Constitution "means any free, adult citizen who is qualified to serve on a jury, vote, and exercise all other rights pertaining to a free person." *McPherson Redevelopment Corporation v. Bass*, No. 882-0410, slip op. (St. Louis City May 6, 1988) (reprinted in the Appendix).

The courts of the State of Missouri have determined that the Missouri Constitution does not discriminate between persons based upon their ownership of real property. Because, as a matter of state law, the Missouri Constitution does not make any such classification, there is no point in trying to decide whether a hypothetical classification would be lawful. This judicial speculation would amount to an advisory opinion of the sort rejected in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court should dismiss the appeal because of the existence of an adequate and independent state law basis for the decision.

II. This Court may not review the means through which the people of a state exercise legislative power, so long as no person is disenfranchised thereby.

The Board of Freeholders has a single power, to place questions involving the structure of government in St. Louis City and St. Louis County on the ballot. As appellants have observed, the totality of the Board of Freeholder process is essentially legislative. *State ex inf. Dalton v. Metropolitan St. Louis Sewer District*, 275 S.W.2d 225, 228 (Mo. banc 1955). The people of the several states of the United States have devised several means through which they exercise legislative power. Most commonly, the people establish legislatures. In many states, however, the people reserve the right to legislate by way of putting a proposition to a referendum of the electorate.

At the outset, it is important to note that a vote on a proposition differs significantly from a vote for public officials. When the people vote for a candidate, someone will win. The question is "which" candidate. When faced by a proposition, the question is "whether" to do something. A "whether" question, cannot be adopted unless the electorate wants the change. The Board, which can only pose propositions, is a means through which the

people of the State of Missouri have given the citizens of metropolitan St. Louis limited legislative power.

This Court has traditionally refused to review the means through which the people of a state choose to exercise legislative power. In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) this Court, in a discussion of the validity of a proposition adopted by way of the initiative process, held that the way the people of a state choose to exercise legislative power is a question relating to the form of government. Because the United States Constitution reserves such questions for congressional rather than judicial review, this Court found the question to be nonjusticiable.

Missouri has established a variety of ways to put matters affecting the citizens of more than one county to put questions on the ballot. For example, the state legislature may vote to put a constitutional amendment before the people. This procedure works much as does Article V of the United States Constitution. Alternatively, the people of the state may follow a specified statutory procedure to amend the constitution by way of initiative petition. In this case, St. Louis City and St. Louis County may reorganize themselves by way of the procedure challenged in this litigation. Each of the methods allows some group of people to put an issue on the ballot.

The method in question, ballot proposal by the consensus of a Board of appointed persons, merely combines several of the methods otherwise used in the state. It is, admittedly, a special plan tailored to the special relationship between St. Louis City and St. Louis County. The Missouri Constitution contains provisions that define both the relationship and, by way of § 30, the rules by which the

people of the city and county can alter that relationship. Briefly speaking, § 30 gives the people of the city and the county a means of altering that relationship without having to persuade a majority of the people of the state to vote for a change. Before the people of the city and county can alter that relationship, however, a majority of each jurisdiction will have to vote to approve that change. Anywhere else in the state, the county legislatures could concoct a plan, put it on the ballot and cause the people to vote. In those cases the elected representatives of the jurisdictions compose a plan and the people vote. In St. Louis, the elected executives of the jurisdictions appoint persons who compose a plan and the people vote. The distinction is simply how the proposition is placed on the ballot.

Unlike the challenged system, every case the appellants cite relates to a limitation on the right to vote. One, albeit aggressive, way to look at the Missouri Supreme Court decision would be to say that the court reviewed the legislative process set forth in § 30 and determined that the equal protection *analysis* contained in the cited cases had no relevancy to the *Millsap* case.[4] Although the Missouri Constitution disenfranchises no person, two people, who apparently prefer the status quo to any possible alternative, have decided that rather than wait to see what the electorate would like to do, they will ask this Court to disrupt the legislative process and to deprive the people of metropolitan St. Louis of the opportunity to vote on the plan

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4. "At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956).

In both the United States and in the State of Missouri, the people hold the ultimate legislative power. In *Pacific States* this Court refused to review the power of the people of the State of Oregon to choose to exercise their legislative power by way of initiative. In this case, the people of Missouri have established a third way to exercise legislative power. Following the *Pacific States* analysis, however, no federal court may review the power of the people to establish a legislative process, at least so long as the procedure provides the affected persons the right to adopt or reject the proposed legislation. This Court should dismiss this appeal for failure to raise a justiciable federal question.

III. There would be a rational basis for limiting membership on the Board to people who own real property.

Appellants emphasize that no court has found a rational basis for the putative requirement that members of the Board own real property. Given the disposition of the litigation in every state court, none has had to decide this question. Appellees, of course, deny that the Missouri Constitution discriminates between persons who do and do not own real property. As it happens, however, there would be a rational basis for imposing a landowner requirement upon appointments to the Board of Freeholders. As can be inferred from a reading of the trial court opinion,[5] appellants urged the point at trial and,

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5. "While ownership of real property may have no rational basis to qualifications of persons who make decisions on those boards [a school Board and an airport commission] it could on [sic: the] Board under consideration. Such qualification could enhance the work on the Board of freeholders as one critical question is change of bounderies [sic] between the City and County." *Millsap v. Quinn* (St. Louis County No. 572794 May 24, 1988) (reprinted in the Jurisdictional Statement at A-19).

using appellants' prerogative to argue any basis for affirmance, in the Missouri Supreme Court. If this Court can look to trial court proceedings in order to discern federal attacks upon a state statute, *see Klinger v. Missouri, supra,* presumably it can do the same for defenses to such an attack.

The existence of a rational basis for discriminating between two classes of citizens need be shown only if there is a discrimination and such discrimination occurs in the context of a federally justiciable controversy. Appellees will reserve these arguments for a brief on the merits, if necessary.

CONCLUSION

This appeal should be dismissed for two reasons. On one hand, it fails to present a federally justiciable issue. On the other, it may be readily sustained on adequate and independent state grounds.

This Court may not take action on this case unless it makes three preliminary findings. First, it must reverse its determination in *Pacific States* that it is the Congress that determines the validity of state legislative structures that do not implicate the right to vote. Second, it must decide that it is more competent to declare Missouri law than are the courts of Missouri. Third, it must inquire into Missouri law and overrule both the *Millsap* decision and the *McPherson* decision.

Because each of the state courts has resolved these questions against the appellants, none has had to consider the basis for the alleged discrimination. Accordingly, before it could make a decision upon the rationality of the basis for the putative classification, this Court would have to review a substantial record that is not yet before it.

For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General of Missouri
SIMON B. BUCKNER
(Counsel of Record)
Assistant Attorney General
3100 Broadway - Suite 609
Kansas City, Missouri 64111
(816) 531-4207
Attorneys for Appellees
State of Missouri and
Governor John D. Ashcroft

THOMAS W. WEHRLE
St. Louis County Counselor
ANDREW J. MINARDI
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105
Attorneys for Appellee County
Executive Gene McNary

JAMES L. WILSON
St. Louis City Counselor
EUGENE P. FREEMAN
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
Attorneys for Appellee Mayor
Vincent C. Schoemehl, Jr.

APPENDIX

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

Cause No. 882-0410
Division No. 3

McPHERSON REDEVELOPMENT CORPORATION,
Plaintiff,

vs.

CHARLES BASS, et al.,
Defendants.

MEMORANDUM AND ORDER

Defendants/Condemnees Snelling (parcel 3) and Arf's the International Dog House, Inc. (parcel 2) have filed motions attacking the authority of the court to appoint condemnation commissioners who are "freeholders", as prescribed by Mo.Const. art. I, Sec. 26 and Section 523.040, R.S.Mo. 1986, in this condemnation action. Condemnees assert that the limitation of appointment of commissioners to "freeholders" imposes a property ownership qualification which contravenes constitutional guaranties of due process and equal protection, relying in part on *Quinn v. State of Missouri,* ..... F.Supp. ..... (W.D.Mo. 1988), rev'd, ... F.2d ..... (8th Cir., April 25, 1988). Condemnor asserts that Missouri's condemnation procedure comports with constitutional requirements and is otherwise reasonable, relying on *Williamson County Regional Planning Comm. v. Hamilton Bank,* 473 U.S. 172 (1985)

and *Woodward v. City of Dearfield Beach*, 538 F.2d 1081 (5th Cir. 1976); condemnor also asserts that *Quinn* is not apposite here.

Standing

At the outset, the Court believes that it must consider whether condemnees, who are themselves real property owners, have standing to raise equal protection and due process claims concerning alleged property qualifications imposed by law on condemnation commissioners. The Court concludes that condemnees have standing and raise a ripe and justiciable controversy, bearing in mind that state courts are not necessarily constrained by the same "case or controversy" principles which govern the jurisdiction of federal courts. Compare *In re Extension of Boundaries of Glaize Creek Sewer Dist.*, 574 S.W.2d 357, 359 (Mo. banc 1978) with *State v. Duren*, 556 S.W.2d 11, 17 n. 8, and 24-25 (dissenting opinion of Seiler, J.) (Mo. banc 1977), rev'd on other grounds, 439 U.S. 357 (1979).

An order appointing condemnation commissioners is interlocutory in character, not appealable, and errors in relation to such an order can be corrected at any time prior to final judgment. *State ex rel. State Highway Comm. v. Hammel*, 290 S.W.2d 113 (Mo. 1956). Condemnees are parties to this action and are entitled to require condemnor to comply with all constitutional and statutory prerequisites before condemnor may take their property without their consent. Absent the filing of exceptions, the commissioners' award has the effect of a jury's verdict. See generally, Freilich, et al., Missouri Law of Land Use Controls 120 (1973). The attack on Section 523.040, and *a fortiori* on Mo.Const. art I, Sec. 26 (1945), could also apply to the qualifications prescribed

for a jury, should condemnees demand a jury, inasmuch as some Missouri cases imply that the "freeholder" qualification applies alike to juries as well as commissioners in condemnation cases. See *Grossman v. Patton*, 186 Mo. 661, 85 S.W. 548 Mo. 1905). Fundamental principles of due process are implicated by any provision of law which imposes property qualifications or other arguably arbitrary exclusions in the jury trial context. Cf. *Peters v. Kiff*, 407 U.S. 493 (1972). Condemnees are entitled to raise this issue.

The Constitutional Issue

Condemnees contend that Missouri law imposes a property qualification on condemnation commissioners and that such a qualification contravenes due process and equal protection. In *Turner v. Fouche*, 396 U.S. 346 (1970), the Supreme Court held that a statutory scheme restricting membership on a county school board to freeholders (defined in Georgia law as real property owners) was wholly without rational basis and hence was an arbitrary exclusion violating the Equal Protection Clause. In *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977), the Supreme Court cited *Turner* in summarily striking down a property qualification for membership on a local airport commission. Other cases have upheld property qualifications for voting in certain types of situations where the agency or board in question has a special limited purpose and has a disproportionate effect on landowners as a group. E.g., *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). The Supreme Court of Missouri has construed all of these precedents, as well as Mo.Const. art. I, Section 2 (Missouri's equal rights guaranty, the state constitutional ana-

logue of the Equal Protection Clause), in *In re Extension of Boundaries of Glaize Creek Sewer Dist.*, supra, holding that limitation of the right to vote on a sewer district extension to property owners violated state and federal constitutional provisions.

This Court considers that the constitutionality of property qualifications for condemnation commissioners or jurors in a condemnation case is open to serious question in light of *Turner v. Fouche*, supra, and *In re Extension of Boundaries of Glaize Creek Sewer Dist.*, supra. Condemnation actions are not limited to acquisition of fee simple interests. Leaseholds, mineral rights, easements, and other interest which do not qualify as freehold interests, as "freehold" is defined in the property law context, can be condemned. The price which a condemnor must ultimately pay for the interest he condemns can affect the market value of other property, thus affecting potential purchasers who are not already property owners, and can affect the price the condemnor will fix for resale or rental of property in cases such as this, involving a residential rehabilitation project. Although a cogent argument can be made that limitation of jury or commissioner selection in condemnation cases only to property owners is rationally related to the purpose of protecting property owners generally, this conclusion is not ineluctable. Thus, the Court is presented with a serious and difficult constitutional question.

Proper Construction of State Law

A statute, and still more a state constitutional provision, should be construed so as to render it constitutional, if possible. A court will avoid the decision of a constitutional question if the case can be fully determined

without reaching it, and should hesitate to mandate a result not explicitly required by the language of a statute if invidious consequences may result. *State ex rel. Union Electric Co. v. Public Service Commission*, 687 S.W.2d 162, 165, 167 (Mo. banc 1985). All doubt is to be resolved in favor of an enactment's validity, and the Missouri courts are allowed "to make every reasonable intendment to sustain the constitutionality of the statute." *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). Legislators and perforce constitutional conventions are presumed to be familiar with constitutional requirements, and when words used permit a reasonable construction consistent with the obvious legislative intent and within constitutional limitations, a construction leading to invalidity should be avoided. *ARO Systems v. Supervisor of Liquor Control*, 684 S.W.2d 504, 508 (Mo.App. 1984).

It would be idle to deny that the term "freeholder," as used in constitutional and statutory predecessors to Mo.Const. art. I, Sec. 26 and Section 523.040, has been construed by Missouri courts to mean an owner of an estate in fee in land. *Grossman v. Patton*, supra; *Fore v. Hoke*, 48 Mo.App. 254 (1982) [sic: 1892]; see also *Shively v. Lankford*, 174 Mo. 535, 74 S.W. 835 (1903). However, these cases were decided without reference to federal constitutional issues, and turned primarily on whether there had been literal compliance with procedural conditions prerequisite to the exercise of the power of eminent domain. Certainly none of the cases necessitated a critical examination of the meaning of the term "freeholder" outside the pure property law context. The Court believes that the public law issues raised by condemnees here, which have implications beyond property law as

such, authorize the Court to examine the meaning of Mo.Const. art. I, Sec. 26 as adopted in 1945, without being controlled by the decisions cited above, all of which arose under the 1875 Constitution.

Before reaching the constitutional issues raised by condemnees herein, under the principles delineated above, this Court is obliged to consider any reasonable construction of Mo. Const. art. I, Sec. 26 and Section 523.040 which could be adopted legitimately to avoid the constitutional issues. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345 (Brandeis, J., concurring). The question, therefore, is one of the intent of the people who framed and adopted the 1945 Constitution. If that intent is unambiguous, and can be said to compel the Court to construe the term "freeholders" as owners of real property in fee, then the court will do so. If it can be said honestly that the term freeholder was, at the time of the adoption of the 1945 Constitution, ambiguous, and capable of alternative constructions, and that the framers and voters passing upon the 1945 Constitution attached no particular meaning to the term, the Court will select the construction which obviates decision of the constitutional issues raised here.

Following research as extensive as permitted under the circumstances here, the Court is convinced that (1) the term "freeholder," while rooted in property law, is an ambiguous term when considered in a broader, public law context, and (2) the people of Missouri, in adopting the 1945 Constitution, did not intend the term "freeholder" to be read exclusively in light of the decisions mentioned above, e.g., *Fore v. Hoke*, supra.

As Maitland aptly remarked, ". . . our land law has been vastly more important than our law of ranks.

. . . even the great distinction between bond and free is apt to appear in practice rather as a distinction between tenures than as a distinction between persons." 1 F. Pollock & F. Maitland, *The History of English Law* 408 (1968 ed.) (hereinafter cited as "Pollock & Maitland"). "In the Middle Ages land law is the basis of all public law." F. Maitland, *The Constitutional History of England*, 37 (Cambridge ed. 1965). Magna Carta's famous language at clause 39, prohibiting dissessin [sic] or imprisonment of any "freeman" except by judgment of his peers or according to the "law of the land" was amended in its reissue in 1217 to limit its protections to those holding free tenements; thereby, in a sense, defining free man in terms of free tenement. 2 Pollock & Maitland at 35-36. By the fourteenth century, the meaning of the term freeholder had come to mean principally those who held by tenure other than villeinage [sic]. Maitland, *Constitutional History*, supra, 35-37. By the fifteenth century, freeholders as a class were those who served on juries, chose certain local officials, such as coroners, attended markets and the sheriff's court, and who assembled in the muster of the forces of the shire, i.e., the militia. 3 W. Stubbs, *Constitutional History of England*, 570-72 (1896). By statute, the right to vote for knights of the shire to serve in Parliament was limited to the famed "forty shilling freeholders," who remained the very definition of the English electorate until the Reform Act of 1832. See 8 Hen. VI c. 7 (1430); 2 Wm. IV, c. 45. Blackstone, discussing estates in land, cites Britton for the definition of an estate of freehold as "possession of the soil by a freeman." 2 Bl.Comm. *104. Chancellor Kent took this comment further (emphasis added):

> By the ancient law, a freehold interest conferred upon the owner a variety of valuable rights and privileges . . . These rights gave him importance and dignity as *a freeholder and freeman.*

4 Kent Comm. *24. In the broadest sense, therefore, freeholder implies more than mere ownership of real property; it implies the status of free citizen. Consequently, many of the older law dictionaries rightly show freeman and freeholder as alternative terms. E.g., *Cyclopedic Law Dictionary*, "Freeman" (1922).

From the foregoing, the Court concludes that the term freeholder as used generally in Anglo-American law is in reality an ambiguous term. While it surely can be used to denote real property owners, it also connotes the whole range of rights and liberties which customarily are deemed part of the status of a free man. The assumption of the older Missouri cases, which were not called upon to analyze the history of the term, that the word freeholder necessarily means only an owner of real property is questionable.

Turning to the adoption of the Missouri Constitution in 1945, the Court can find nothing in the proceedings of the constitutional convention which framed art. I, Sec. 26 evidencing an intention to attach any particular meaning to the term "freeholder." The language was simply imported bodily into the 1945 Constitution from the 1875 Constitution. See Proceedings of the Missouri Constitutional Convention 1686, 1703, *passim*. (1943-44). The principal concern of the convention was preserving judicial decisions governing the scope of the power of eminent domain under the 1875 Constitution. *Id.*, 1719, 1756. The bulk of the debates concerning art. I, Sec. 26

dealt with the condemnation of excess property; very little mention was made of the procedural aspect of condemnation. No mention at all was made of the term "freeholder" as intended to limit the composition of juries or condemnation commissions to real property owners. Considering the rather tortuous history that juries in condemnation cases have had under Missouri law, see *State ex rel. State Highway Comm. v. Cool's Tall Tower*, 700 S.W.2d 114 (Mo.App. 1985), it seems strange that so little mention was made of the right to trial by jury. Other things being equal, the standard rule of construction would have it that the convention was aware of and content with the decisions construing the term "freeholder." However, that rule of construction is not to be followed slavishly. See, e.g., *Wentz v. Price Candy Co.*, 175 S.W.2d 852, 856-57 (Mo. 1943). The Court believes that there is a reasonable basis upon which to conclude that the framers of the 1945 Constitution did not embrace the old decisions concerning the term "freeholders." On the contrary, it seems safe to say that the use of the word "freeholder" in the Missouri Constitution was intended to and should be taken in its broadest sense, i.e., that of any adult person qualified to vote or serve on a jury under the law.[1] The last Missouri constitutional convention expressed its intention to promulgate an "adaptable" constitution, which, insofar as eminent domain was concerned, would preserve the right to trial by jury. *Proceedings*, supra, 1656-57. The

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1. The Court is fortified in this conclusion by an examination of the proceedings of the constitutional convention concerning Mo.Const. art. VI, Sections 30 et seq., which also refer to "freeholder." These debates are likewise devoid of any manifest intention to use the term "freeholder" in a narrow, property law sense, as opposed to a broader, public law sense. *Proceedings*, supra, 2843, 2887ff, 2907ff, 2980ff, 3035-3108.

intention of the convention, and of the people who adopted the 1945 Constitution, would not be well served by fastening upon the word "freeholder," as used in the Constitution, a meaning which could not stand the test of time. The Constitution, after all, is to be construed so as to give terms a broader meaning. *Roberts v. McNary*, 636 S.W.2d 332, 335 (Mo. banc 1982). It does no violence to the meaning of the word "freeholder" at common law to say that it meant (and now means) more than simply a property owner. In the public law context, the term freeholder means free citizen, and this Court concludes that there is nothing "forced or unnatural," compare *Quinn v. State of Missouri*, supra, Dist. Ct. slip op. at 17, in holding that the term "freeholder" as used in Mo.Const. art. I, Sec. 26 and Section 523.040 means any free, adult citizen who is qualified to serve on a jury, vote, and exercise all other rights pertaining to a free person.

Appointment of Commissioners in This Case

Since the term freeholders as used in Mo.Const. art. I, Sec. 26 and Section 523.040 is not to be construed as imposing a property qualification on members of condemnation commissions or juries trying condemnation cases, it follows that *Turner v. Fouche*, supra, is inapposite and the condemnees' facial attack on those constitutional and statutory provisions must be rejected. It cannot be gainsaid, however, that the three commissioners appointed in this case are in fact property owners, or so the Court is informed.

The appointment of condemnation commissioners in the 22nd Circuit is an extremely informal process, left entirely to the trial court's discretion. This case is no

exception. The Court can and does represent to the parties that no person considered by the Court was excluded on the basis of lack of property ownership. Nevertheless, the Court believes that it must consider whether a condemnation commission composed of property owners only, on the facts of this case, constitutes a denial of equal protection or due process. Cf. *Batson v. Kentucky*, ... U.S. ....., 106 S.Ct. 1712 (1986).

Both objecting condemnees in this case are owners of real property in fee. Neither has objected to the other qualifications of the commissioners, two of whom are lawyers and one of whom has had experience with urban redevelopment. All three have served in judicial or quasi-judicial positions (one as a former municipal court judge, one as an administrative hearing officer, and one as a member of an administrative body). Property ownership was not the basis for the Court's selection of any of the three commissioners in this case; they are fully qualified to perform the statutory function of condemnation commissioners without regard to their own property ownership. Since there are legitimate, nondiscriminatory reasons for the selection of these commissioners, the Court cannot convict itself of abetting a violation of equal protection or due process in this case by practicing some form of invidious discrimination in selecting the commissioners.

ORDER

For the foregoing reasons, it is

ORDERED that defendant Snelling's motion for new trial and defendant Arf's motion for rehearing be and the same are denied; the stay previously entered herein is

vacated, and the Clerk is directed to serve the commissioners' report as to all parcels in accordance with law.

SO ORDERED:

/s/ Robert H. Dierker, Jr.
Circuit Judge

Dated: 6 May 1988

cc: Counsel of record

JOINT

APPENDIX

(3)

No. 88-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

vs.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal from The Supreme Court of Missouri

JOINT APPENDIX

APPEAL DOCKETED DECEMBER 22, 1988
PROBABLE JURISDICTION NOTED
FEBRUARY 21, 1989

(Continued on Inside Front Cover)

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

70pp

SIMON B. BUCKNER*
Assistant Attorney General
3100 Broadway, Suite 609
Kansas City, Missouri 64111
Telephone: (816) 531-4207
Attorney for Appellees
State of Missouri and
Governor John D. Ashcroft

KEVIN M. O'KEEFE*
UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE
906 Olive Street, Suite 300
St. Louis, Missouri 63101
Telephone: (314) 621-9550

and

THOMAS W. WEHRLE
St. Louis County Counselor
ANDREW J. MINARDI
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105
Telephone: (314) 889-2042

JESS W. ULLOM
MARK D. MITTLEMAN
KAVENEY, BEACH, BOND,
ULLOM & BURCKE
222 South Central, Suite 900
St. Louis, Missouri 63105
Telephone: (314) 863-8484

Attorneys for Appellee
County Executive Gene McNary

Attorneys for Appellants

*Counsel of Record

JAMES L. WILSON
St. Louis City Counselor
EUGENE P. FREEMAN
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
Telephone: (314) 622-3361

Attorneys for Appellee
Mayor Vincent C. Schoemehl, Jr.

KENNETH F. TEASDALE
THOMAS CUMMINGS
THOMAS B. WEAVER
JORDAN B. CHERRICK
ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
Telephone: (314) 621-5070

Attorneys for Appellees
Members of the Board
of Freeholders

TABLE OF CONTENTS

NOTATION OF PREVIOUSLY REPRODUCED ITEMS

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Statement of Jurisdiction:

CHRONOLOGICAL LIST OF DOCKET ENTRIES

IN THE CIRCUIT COURT OF
THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE McNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

v.

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

No. 572794

Date	Description
2/16/88	Petition filed.
2/19/88	On application of Plaintiffs, cause set for trial on merits March 7, 1988, 9:30 a.m. Defendants ordered to file Answers by February 26, 1988 and to comply with other conditions as so ordered and filed.

2/23/88	Special entry appearance filed on behalf of Defendant Patricia J. Kampsen by Howard Paperner and Louis S. Czech for purpose of quashing order, summons and service herein as per motion filed.
2/24/88	Defendant Kampsen appears specially by Attorney Howard Paperner for purpose of Motion to Quash only. Plaintiffs appear by counsel. Order of this Court of February 19, 1988 is hereby set aside and all other aspects of said Motion denied.
2/24/88	On application of Plaintiffs, this action is set for trial on merits on April 4, 1988 at 9:30 a.m. No extension of time to answer or otherwise respond to Petition in this action will be granted. On or before April 1, 1988, the parties are ordered to meet, confer, and prepare a Stipulation of Uncontested Facts to be presented at the hearing in this action. The parties shall also file simultaneous Trial Briefs and Proposed Findings of Fact and Conclusions of Law not later than five days prior to trial of this action.
3/24/88	Defendant Quinn's Application for Continuance from April 4, 1988 is sustained. Cause to be reset on application.
4/15/88	Plaintiff McNary's Motion for Summary Judgment filed.
4/29/88	Plaintiff Schoemehl's Motion for Summary Judgment by Adoption filed.
5/4/88	Cause assigned to trial in Division 5 on May 16, 1988 at 9:00 a.m.
5/6/88	Plaintiff Freeholders' Motion for Summary Judgment filed.

5/6/88 Kevin M. O'Keefe enters his appearance as co-counsel for Defendants. Defendants' Answer and Cross Petition filed.

5/12/88 Defendants' Second Motion for Summary Judgment filed.

5/16/88 Cause called, parties appear by attorneys. Argument presented. Parties granted three days to file Memoranda of Law. Thereafter, Motions for Summary Judgment submitted.

5/24/88 Court Memorandum and Judgment filed. Plaintiffs' Motion for Summary Judgment granted. Defendants' Motion for Summary Judgment is denied. Defendants' Counter-Claim is dismissed with prejudice. Defendants' Request for Attorneys Fees denied. Parties shall bear their own costs.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team '88 Feb. 16, P 4:39

Wayne L. Millsap, Chairman and Joseph S. Balcer,
Robert L. Bannister, Sandra Hasser Bennett,
Allen S. Boston, Claude Brown, William G. Cocos, Jr.
Jo Curran, Thomas P. Dunne, Catherine Frances Emerson,
Gretta Forrester, Albert H. Hamel, William J. Harrison,
J. P. Morgan, Catherine Rea, Daniel L. Schlafly,
Henry S. Stolar, Lucille Walton, and Margaret Bush Wilson,
Members of the St. Louis City-County Board of Freeholders,

The State of Missouri John D. Ashcroft, Governor
of the State of Missouri

Gene McNary, St. Louis County Executive

Vincent C. Schoemehl, Jr., Mayor of the City of St. Louis
Plaintiffs,

v.

Robert J. Quinn, Jr.
26 Parc Twyne
St. Louis, Missouri 63135
and
Patricia J. Kampsen
7559 Byron
Clayton, Missouri 63105
Individually, and on behalf of all other similarly
situated individuals,
Defendants.

PETITION FOR DECLARATORY JUDGMENT

Plaintiffs, for their cause of action for Declaratory Judgment, state as follows:

1. Plaintiff WAYNE L. MILLSAP is Chairman and Plaintiffs JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, THOMAS P. DUNNE, CATHERINE FRANCES EMERSON, GRETTA FORRESTER, ALBERT H. HAMEL, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL L. SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON ("Members") are members of the St. Louis City-County Board of Freeholders (the "Board") appointed pursuant to §§30(a) and 30(b) of Article VI of the Missouri Constitution (hereafter "§30").

2. Plaintiff, GENE McNARY ("County Executive McNary"), is the County Executive of St. Louis County, Missouri, and the Official responsible for appointing the members of the Board who are electors of St. Louis County.

3. Plaintiff, VINCENT C. SCHOEMEHL, JR. ("Mayor Schoemehl"), is the Mayor of the City of St. Louis, Missouri, and the official responsible for appointing the members of the Board who are electors of the City of St. Louis.

4. Plaintiff, the STATE OF MISSOURI is one of the United States of America, and Plaintiff, JOHN D. ASHCROFT ("Governor Ashcroft"), is the Governor of the State of Missouri and the state official responsible under §30 for appointing the member of the Board who does not reside in either the City of St. Louis or of St. Louis County, Missouri.

5. §30 is a constitutional enactment of the people of the State of Missouri.

6. Defendant, ROBERT J. QUINN, JR. ("Quinn"), is a resident of St. Louis County, Missouri and is the elected Missouri State Representative from the 80th District. Plaintiff QUINN is and has been since January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri.

7. Defendant, PATRICIA J. KAMPSEN ("Kampsen"), is a resident of St. Louis County, Missouri and a practicing attorney within the metropolitan St. Louis, Missouri area. Plaintiff KAMPSEN is and has been since before January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri.

8. Defendants Quinn and Kampsen do not own real property and assert that they represent a class consisting of resident taxpayers, electors, and individuals who do not own real property in St. Louis County, Missouri and of the City of St. Louis, Missouri. Said class of taxpayers, resident electors and individuals who do not own real property is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class, and the Defendants assert that their claims are typical of the claims of the class.

9. The people of the County of St. Louis and the people of the City of St. Louis in order to exercise the rights given to them under §30, filed with the officials in general charge of elections in the County of St. Louis and the City of St. Louis, respectively, petitions proposing to exercise the power granted in §30, which had been signed by registered voters of the County of St. Louis and the City of St. Louis in such number as to equal three percent of the total vote cast in the County and City, respectively, at the last general election for governor.

10. Upon the filing of the requisite petition in St. Louis County, County Executive McNary, with the approval of a majority of the St. Louis County Counsel, appointed nine electors of St. Louis County to serve as members of the Board.

11. Plaintiffs Wayne L. Millsap, Allen S. Boston, William G. Cocos, Jr., Jo Curran, Thomas P. Dunne, Gretta Forrester, Albert H. Hamel, Catherine Rea and Lucille Walton were so duly appointed by Supervisor McNary and are presently serving as members of the Board.

12. Upon filing of the requisite petition in St. Louis City, Mayor Schoemehl, with the approval of the majority of the St. Louis City Board of Alderman, appointed nine electors of the City of St. Louis to serve as members of the Board.

13. Plaintiffs Joseph S. Balcer, Robert L. Bannister, Sandra Hasser Bennett, Claude Brown, Catherine Frances Emerson, William J. Harrison, Daniel L. Schlafly, Henry S. Stolar and Margaret Bush Wilson were so duly appointed by Mayor Schoemehl and are presently serving as members of the Board.

14. Upon receipt of petitions signed by the requisite number of residents of St. Louis County and the City of St. Louis, Governor Ashcroft appointed Plaintiff J. P. Morgan as an elector and resident of other than St. Louis County or the City of St. Louis to serve as a member of the Board.

15. Upon their appointment the members of the Board organized themselves, elected Plaintiff Wayne L. Millsap as their Chairman and have, with diligence and dispatch, set about the task imposed upon them by the people of St. Louis County and the City of St. Louis to formulate and adopt a plan for the government of all or a part of St. Louis County and the City of St. Louis.

16. In that regard, Plaintiff Board Members have held meetings, have employed staff, have employed counsel and have sought and obtained input from the citizens of St. Louis County and the City of St. Louis to be utilized in developing the plan.

17. The Board is charged, with developing such plan within one year after its appointment and, therefore, time is of the essence in allowing the Board to proceed with its mandate.

18. Defendants claim that the Baord is improperly constituted since membership on the Board is limited to owners of real property and such limitation is violative of Article VI and of the First, Ninth, Fourteenth and Fifteenth Amendments of the United States Constitution. In addition Defendants claim

that the manner in which the Plaintiff Board Members were appointed is violative of the foregoing provisions of the United States Constitution.

19. While Plaintiffs deny that ownership of real property is a prerequisite for membership on the Board, even if ownership of real property were a prerequisite, such a requirement would bear a rational relationship to the purposes for which the Board was constituted. Plaintiffs further assert that the Board Members were duly and properly appointed and none of the claims by Defendants would prevent the Board from completing and submitting a plan.

20. A controversy therefore presently exist between Plaintiffs and Defendants as to whether the Board is a constitutionally constituted body and whether Plaintiff Board Members were properly appointed and whether the Plaintiff Board Members can exercise the mandate given to them by the people of the County of St. Louis and City of St. Louis.

21. The interests of Plaintiffs and Defendants are in fact adverse, the parties hereto have legally protectable interests involved, and it is timely that a judicial determination be made of the questions involved.

22. This Court's declaration of the laws of the State of Missouri and, if necessary, the Constitution of the United States would terminate the uncertainty which has arisen from Defendants claims concerning the Board.

23. Plaintiffs have no other adequate remedy and for this Court to grant declaratory and other appropriate relief would avoid a multiplicity of litigation and the frustration of the purposes dictated by the Constitution in the State of Missouri.

WHEREFORE, Plaintiffs, WAYNE L. MILLSAP, Chairman and JOSEPH S. BALCER, et. al. Members of the St. Louis County-City Board of Freehodlers (the "Board"), the STATE OF MISSOURI, JOHN D. ASHCROFT, GENE

McNARY and VINCENT C. SCHOEMEHL, JR. pray that this Court order, adjudge, decree, determine and declare the status, rights, obligations responsibilities of the Plaintiffs as they relate to §§30(a) and 30(b) of Article VI of the Missouri Constitution ("§30") and, particularly, that this Court determine that Plaintiff Board Members are the duly constituted members of the Board and that the Board is validly and constitutionally appointed in accordance with the Constitution of the State of Missouri and the United States Constitution and the Board has full power and authority to carry out the mandate given it pursuant to §30 and that this Court declare and determine that this action should proceed as a class action and that this Court enter such other orders as are just and proper under the circumstances.

ARMSTRONG, TEASDALE, KRAMER, VAUGHAN & SCHLAFLY

By Thomas Cummings
Kenneth F. Teasdale #17248
Thomas Cummings #21448
Thomas B. Weaver #29176
Jordan B. Cherrick #30995
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for members of the St. Louis City-County Board of Freeholders

JAMES L. WILSON
ST. LOUIS CITY COUNSELOR

By Eugene P. Freeman
Eugene P. Freeman #14608
Deputy City Counselor,
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
(314) 622-3366

Attorneys for Plaintiff Mayor Vincent C. Schoemehl, Jr.

ATTORNEY GENERAL
WILLIAM L. WEBSTER

By Peter Lumaghi
Simon B. Buckner #33455
Peter Lumaghi #24160
Assistant Attorneys General
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207

Attorneys for Plaintiffs The State of Missouri and Governor John D. Ashcroft

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

By Andrew J. Minardi
Andrew J. Minardi #18955
Assistant County Counselor
41 South Central
Clayton, Missouri 63105
(314) 889-2042

Attorney for Plaintiff County Executive Gene McNary

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572 794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

vs.

Robert J. Quinn, Jr., et al.,
Defendants.

PLAINTIFF GENE McNARY'S MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff Gene McNary and, pursuant to Civil Rule 74.04, moves the Court to enter summary judgment in favor of Plaintiffs and in support hereof states that the pleadings, stipulations of fact, admissions on file and affidavits show:

(1) There is no genuine issue as to any material fact;

(2) The only matters for adjudication by the Court are issues of law, *viz:*

(a) The meaning, interpretation, validity and constitutionality of Article VI, Sections 30(a) and 30(b) of the Missouri Constitution 1945 as amended;

(b) Whether the Board of Freeholders embodied pursuant to the above sections is a lawfully constituted Board;

(c) Whether Article VI, Sections 30(a) and 30(b) on its face or as applied deny equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution to Defendants herein and the class of persons they represent;

(d) Whether Defendants' First, Ninth and Fifteenth Amendments rights under the United States Constitution have been denied or violated.

WHEREFORE, Plaintiff herein prays the Court to render judgment in favor of Plaintiffs and against Defendants declaring and adjudicating that:

(1) Article VI, §§30(a) and 30(b) Missouri Constitution are valid and constitutional;

(2) That the Board appointed pursuant to Article VI §§30(a) and 30(b) is lawfully constituted;

(3) That the Board has full power and authority to carry out the mandate given it by Article VI, §30;

(4) that, in the alternative, the word "freeholder" is severable from Article VI §§30(a) and 30(b).

THOMAS W. WEHRLE
County Counselor

By Andrew J. Minardi #18955
Associate County Counselor
41 S. Central
Clayton, Mo. 63105
889-2042
Attorneys for Plaintiff
Gene McNary

Certificate of Service and Attached Affidavit in Support of Motion deleted.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572-794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

v.

Robert J. Quinn, Jr., et al.,
Defendants.

PLAINTIFF MAYOR OF ST. LOUIS VINCENT C. SCHOEMEHL, JR'S MOTION FOR SUMMARY JUDGMENT BY ADOPTION

(Filed April 29, 1988)

Comes now Plaintiff Vincent C. Schoemehl, Jr., Mayor of the City of St. Louis, Missouri, and hereby adopts the *Plaintiff Gene McNary's Motion for Summary Judgment,* heretofore filed, together with such Motion's attachments.

Respectfully submitted,

/s/ Eugene P. Freeman, #14608
Deputy City Counselor
Attorney for Vincent C.
Schoemehl, Jr., Plaintiff
314 City Hall
St. Louis, MO 63103
(314) 622-3366

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team B

Division 5

Wayne L. Millsap, Chairman
and
Joseph S. Balcer, et al.,
Members Of The St. Louis City-County
Board Of Freeholders,

The State Of Missouri and John D. Ashcroft,
Governor of the State of Missouri

Gene McNary, St. Louis County Executive

Vincent C. Schoemehl, Jr.
Mayor of the City of St. Louis
Plaintiffs,

v.

Robert J. Quinn, Jr.
and
Patricia J. Kampsen
Individually, and on behalf of all other
similarly situated individuals,
Defendants.

PLAINTIFFS, MEMBERS OF THE ST. LOUIS CITY-COUNTY BOARD OF FREEHOLDERS' MOTION FOR SUMMARY JUDGMENT

(May 6, 1988)

Plaintiffs, Members of the St. Louis City-County Board of Freeholders, for their Motion For Summary Judgment, state as follows:

1. Plaintiffs and Defendants have previously entered into a Stipulation of Uncontested Facts (A copy of which, along with all exhibits is attached hereto as Exhibit A) in the case of *Robert J. Quinn, Jr. and Patricia J. Kampsen v. State of Missouri, et al.*, being Cause No. 87-4492-CV-6 in the United States District Court, Western District of Missouri.

2. Plaintiff WAYNE L. MILLSAP is Chairman and Plaintiffs JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, THOMAS P. DUNNE, CATHERINE FRANCES EMERSON, GRETTA FORRESTER, ALBERT H. HAMEL, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL L. SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON ("Members") are members of the St. Louis City-County Board of Freeholders (the "Board") appointed pursuant to §§30(a) and 30(b) of Article VI of the Missouri Constitution (hereafter "§30"). Stipulation of Uncontested Facts (hereinafter referred to as "Stip.") ¶9.

3. Plaintiff, GENE McNARY ("County Executive McNary"), is the County Executive of St. Louis County, Missouri, and the official responsible for appointing the members of the Board who are electors of St. Louis County. Stip. ¶7.

4. Plaintiff, VINCENT C. SCHOEMEHL, JR. ("Mayor Schoemehl"), is the Mayor of the City of St. Louis, Missouri, and the official responsible for appointing the members of the Board who are electors of the City of St. Louis. Stip. ¶8.

5. Plaintiff, the STATE OF MISSOURI is one of the United States of America, and Plaintiff, JOHN D. ASHCROFT ("Governor Ashcroft"), is the Governor of the State of Missouri and the state official responsible under §30 for appointing the member of the Board who does not reside in either the City of St. Louis or of St. Louis County, Missouri. Stip. ¶6.

6. §30 is a constitutional enactment of the people of the State of Missouri. Defendants' Answer (hereinafter referred to as "Answer") ¶5.

7. Defendant, ROBERT J. QUINN, JR. ("Quinn"), is a resident of St. Louis County, Missouri and is the elected Missouri State Representative from the 80th District. Plaintiff QUINN is and has been since January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri. Stip. ¶1, Answer ¶6.

8. Defendant, PATRICIA J. KAMPSEN ("Kampsen"), is a resident of St. Louis County, Missouri and a practicing attorney within the metropolitan St. Louis, Missouri area. Plaintiff KAMPSEN is and has been since before January 1, 1987, to date, a registered voter and elector of the County of St. Louis, Missouri. Stip. ¶3, Answer ¶7.

9. Defendants Quinn and Kampsen do not own real property and they represent a class consisting of resident taxpayers, electors, and individuals who do not own real property in the State of Missouri. Said class of taxpayers, resident electors and individuals who do not own real property is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class, and the Defendants claims are typical of the claims of the class. Defendants fairly and adequately represent the interests of the class. Stip. ¶11, 12, 13 and 14, Defendants Counterclaim (designated "Cross Petition" and hereinafter referred to as "Counterclaim") ¶6.

10. The people of the County of St. Louis and the people of the City of St. Louis in order to exercise the rights given to them under §30, filed with the officials in general charge of elections in the County of St. Louis and the City of St. Louis, respectively, petitions proposing to exercise the power granted in §30, which had been signed by registered voters of the County of St. Louis and the City of St. Louis in such number as to equal three

percent of the total vote cast in the County and City, respectively, at the last general election for governor. Stip. ¶15.

11. Upon the filing of the requisite petition in St. Louis County, County Executive McNary, with the approval of a majority of the St. Louis County Counsel, appointed nine electors of St. Louis County to serve as members of the Board. Stip. ¶16 and 17.

12. Plaintiffs Wayne L. Millsap, Allen S. Boston, William G. Cocos, Jr., Jo Curran, Thomas P. Dunne, Gretta Forrester, Albert H. Hamel, Catherine Rea and Lucille Walton were so duly appointed by Supervisor McNary and are presently serving as members of the Board. Stip. ¶9.

13. Upon filing of the requisite petition in St. Louis City, Mayor Schoemehl, with the approval of the majority of the St. Louis City Board of Alderman, appointed nine electors of the City of St. Louis to serve as members of the Board. Stip. ¶18 and 19.

14. Plaintiffs Joseph S. Balcer, Robert L. Bannister, Sandra Hasser Bennett, Claude Brown, Catherine Frances Emerson, William J. Harrison, Daniel L. Schlafly, Henry S. Stolar and Margaret Bush Wilson were so duly appointed by Mayor Schoemehl and are presently serving as members of the Board. Stip. ¶9.

15. Upon receipt of petitions signed by the requisite number of residents of St. Louis County and the City of St. Louis, Governor Ashcroft appointed Plaintiff J. P. Morgan as an elector and resident of other than St. Louis County or the City of St. Louis to serve as a member of the Board. Stip. ¶9 and 21.

16. Upon their appointment the members of the Board organized themselves, elected Plaintiff Wayne L. Millsap as their Chairman and have, with diligence and dispatch, set about the task imposed upon them by the people of St. Louis County and the City of St. Louis to formulate and adopt a plan for the

government of all or a part of St. Louis County and the City of St. Louis. Stip. ¶22.

17. In that regard, Plaintiff Board Members have held meetings, have employed staff, have employed counsel and have sought and obtained input from the citizens of St. Louis County and the City of St. Louis to be utilized in developing the plan. Stip. ¶23, 24 and 25.

18. The Board is charged with returning a plan to the appropriate official of the City and County within one year after its appointment and, therefore, time is of the essence in allowing the Board to proceed with its mandate. Article VI, §30(b).

19. Defendants claim that the Board is improperly constituted since membership on the Board is limited to owners of real property and such limitation is violative of Article VI and of the First, Ninth, Fourteenth and Fifteenth Amendments of the United States Constitution. In addition, Defendants claim that the manner in which the Plaintiff Board Members were appointed is violative of the foregoing provisions of the United States Constitution. Counterclaim ¶2 and 3.

20. If ownership of real property is a prerequisite for membership on the Board, such a requirement bears a rational relationship to the purposes for which the Board was constituted.

21. If this Court were to conclude that a requirement of ownership of real property did not bear a rational relationship to the purposes for which the Board was constituted, this Court should interpret §30 in light of Article I Section 2 of Missouri's Constitution (the equal rights and opportunities clause) so that "freeholder" under §30 would include persons who do not own real property.

22. If this Court were to conclude that "freeholder" means "landowner" in the context of §30 and that the use of the phrase freeholder in §30 is unconstitutional, the freeholder provision should be severed from the remainder of §30.

23. The Board Members were duly and properly appointed and none of the claims by Defendants would prevent the Board from completing and submitting a plan and, to the extent any members of the Board were found to have been improperly selected, the respective appointing authorities should be allowed to reconsider all or a portion of their previous appointments so as to allow the Board to complete and submit a plan.

24. A controversy presently exists between Plaintiffs and Defendants as to whether the Board is a constitutionally constituted body and whether Plaintiff Board Members were properly appointed and whether the Plaintiff Board Members can exercise the mandate given to them by the people of the County of St. Louis and City of St. Louis. Answer ¶20.

25. The interests of Plaintiffs and Defendants are in fact adverse, the parties hereto have legaliy protectable interests involved, and it is timely that a judicial determination be made of the questions involved. Answer ¶21.

26. This Court's declaration of the laws of the State of Missouri and, if necessary, the Constitution of the United States would terminate the uncertainty which has arisen from Defendants' claims concerning the Board.

27. Plaintiffs have no other adequate remedy and for this Court to grant declaratory and other appropriate relief would avoid a multiplicity of litigation and the frustration of the purposes dictated by the Constitution in the State of Missouri.

WHEREFORE, Plaintiffs, WAYNE L. MILLSAP, Chairman and JOSEPH S. BALCER, et al. Members of the St. Louis County-City Board of Freeholders (the "Board"), pray that this Court enter a summary judgment declaring that Sections 30(a) and 30(b) of Article VI of the Missouri Constitution ("§30") do not violate the United States Constitution; that Plaintiff Board Members are the duly constituted members of the Board; that the Board is validly and constitutionally appointed in accordance with the Constitution of the State of Missouri and the United States Constitution; that the Board has full power and authority to carry out the mandate given it pursuant to §30; that this Court certify this action as a class action and that it order that this action should proceed as a class action and that it hold that Defendants have fully and adequately represented the interests of the class.

Respectfully submitted,

ARMSTRONG, TEASDALE,
KRAMER, VAUGHAN &
SCHLAFLY

/s/ Thomas Cummings
Kenneth F. Teasdale #17248
Thomas Cummings #21448
Thomas B. Weaver #29176
Jordan B. Cherrick #30995
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for Members Of
The St. Louis City and County
Board of Freeholders

Certificate of Service Deleted

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Cause No. 87-4492-CV-6

Robert J. Quinn, Jr. and Patricia J. Kampsen,
Plaintiffs,

v.

The State of Missouri, et al.,
Defendants.

STIPULATION OF UNCONTESTED FACTS AND STATEMENT OF FACTS IN CONTROVERSY

The parties, pursuant to this Court's Order of January 27, 1988 and subject to each party's reservation of its right to object to relevancy or attorney-client or work product privilege, hereby submit this Stipulation of Uncontested Facts.

1. Plaintiff, ROBERT J. QUINN, JR. ("Quinn"), is and, at all times pertinent to the issues herein, was a resident of St. Louis County, Missouri; the elected Missouri State representative from the 80th District and a taxpayer, a registered voter and elector of the County of St. Louis, Missouri.

2. Plaintiff Quinn does and, at all times pertinent to the issues herein, has occupied an apartment in St. Louis County under a lease for a term of one year. Plaintiff Quinn is unmarried.

3. Plaintiff, PATRICIA K. KAMPSEN ("Kampsen"), is and, at all times pertinent to the issues herein, was a resident of St. Louis County, Missouri, a practicing attorney within the Metropolitan St. Louis area and a taxpayer, registered voter and elector of the County of St. Louis, Missouri.

4. Plaintiff Kampsen does and, at all times pertinent to the issues herein, has occupied an apartment in St. Louis County under a month-to-month lease. Plaintiff Kampsen is unmarried.

5. Defendant, STATE OF MISSOURI, is one of the United States of America with its capital located in Jefferson City, Missouri, in the Western District.

6. Defendant, JOHN D. ASHCROFT ("Ashcroft"), is and, at all times pertinent to the issues herein, was the Governor of the State of Missouri and the official responsible for appointing a member of a board of freeholders (the "Board") constituted in accordance with Article VI, Sections 30(a) and 30(b) of the Missouri Constitution of 1945 (the "Section 30") who does not reside in either the City of St. Louis or the County of St. Louis, Missouri. Defendant Ashcroft presently resides in Jefferson City, Missouri, in the Western District.

7. Defendant, GENE MCNARY ("McNary"), is and, at all times pertinent to the issues herein, was the County Executive (chief executive officer) of St. Louis County, Missouri and the official responsible for appointing members of the Board who are electors of St. Louis County. Defendant McNary presently resides in St. Louis County, in the Eastern District.

8. Defendant, VINCENT C. SCHOEMEHL, JR. ("Schoemehl"), is and, at all times pertinent to the issues herein, was the Mayor of the City of St. Louis and the official responsible for appointing members to the Board who are electors of the City of St. Louis, Missouri. Defendant Schoemehl presently resides in the City of St. Louis, in the Eastern District.

9. Defendants, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA H. BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, ALBERT H. HAMEL, WILLIAM J. HAR-

RISON, WAYNE L. MILSAP, J.P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON are and, at all times pertinent to the issues herein, were individuals and electors of St. Louis City or St. Louis County who have been appointed to the Board in accordance with Section 30. Defendant Morgan presently resides in Jefferson City, Missouri, in the Western District and the other Defendant Members of the Board presently reside in either St. Louis City or the County of St. Louis, in the Eastern District.

10. Defendant Members of the Board began the discharge of their duties on Monday, September 28, 1987 at a meeting held in the Chambers of the Board of Aldermen in the City Hall of the City of St. Louis.

11. Neither Plaintiff Quinn nor Plaintiff Kampsen owns, nor, at any time pertinent to the issues herein, has owned any interest in real property either in fee or for life.

12. There is a class of persons consisting of persons who are residents, taxpayers, registered voters, and electors in the City of St. Louis and St. Louis County who are not owners of any interest in real property either in fee or for life.

13. The number of members of the class aforesaid is so numerous that joinder of all members in this action is impractical.

14. Each Defendant Member of the Board is an owner of a fee or life interest in real property, either in his or her own name or jointly with another person.

15. The attached Exhibit 1 is a true and accurate copy of the petitions filed with the officials in general charge of elections in the City and County, respectively, in response to which the Members of the Board were appointed.

16. Defendant McNary established criteria for individuals from St. Louis County whom he would consider for appointment to the Board. Defendant McNary determined that he wished to appoint individuals to the Board who (1) had no vested interest in any governmental organization in the St. Louis Metropolitan area; and (2) showed leadership in their community; and (3) had an interest in County problems; and (4) would be able to work together; and (5) represented a geographical mix of St. Louis County.

17. Before being submitted to the County Council the list of potential candidates prepared by Defendant McNary was given to Defendant McNary's Executive Assistant, Mr. William Skaggs for forwarding to the County Council. Mr. Skaggs consulted with the County Counselor's office and was told that it was that office's opinion that an additional qualification for membership on the Board was an ownership interest in real property. Mr. Skaggs then determined from the County Assessor's records that each of the individuals who Defendant McNary had selected as potential candidates did have an ownership interest in real property. Thereafter the list was prepared in final form and submitted to the St. Louis County Council which approved the appointment of the persons listed. Those persons were thereupon appointed to the Board.

18. Defendant Schoemehl established criteria for individuals from the City of St. Louis whom he would consider for appointment to the Board. Defendant Schoemehl determined that he wished to appoint individuals to the Board who (1) had a history of community and civic service and experience; and (2) had shown a leadership ability; (3) were smart and independent and would be perceived as such by the community; and (4) were distributed geographically and racially among city residents. Mayor Schoemehl sought to have a "blue ribbon" panel to serve as members of the Board. In initially developing his list of potential candidates for the Board Defendant Schoemehl did not consider whether or not any of the individuals he placed on the list had an ownership interest in real property.

19. Once the list of potential candidates was prepared, Defendant Schoemehl's staff consulted with the City Counselor's office and was told it was that office's opinion that an additional qualification for membership on the Board was an ownership interest in real property. It was then determined that the Reverend Paul C. Reinert, a potential candidate, did not have an ownership interest in real property. In view of this opinion and to be on the safe side, Father Reinert was not considered further for membership on the Board. In making his final selection of candidates for membership on the Board Defendant Schoemehl sought to appoint individuals who would represent all citizens of the St. Louis metropolitan area and did not intend to appoint any individual who would have any bias in favor of or against individuals who had an ownership interest in real property.

20. Father Reinert is a Catholic Priest and a member of the Society of Jesus (Jesuit) religious order. Father Reinert does not own any interest in real property.

21. Defendant Ashcroft determined that he wished to appoint an individual to the Board who (1) was a resident of the State of Missouri; and)2) did not live in either the City or the County of St. Louis; and (3) had no strong identity to either the County or City of St. Louis; and (4) had time to devote service on the Board; and (5) had an ownership interest in real property. Defendant Ashcroft sought to appoint an individual to the Board who would represent all citizens of the State of Missouri and did not intend to appoint any individual who would have any bias in favor of or against individuals who had an ownership interest in real property.

22. From and after their initial meeting on September 28, 1987 the Members of the Board have proceeded with the discharge of their duty and have met at meetings open to and attended by members of the public and the news media at the various times, dates and times set forth below:

DATE OF MEETING	TIME MEETING BEGAN	TIME MEETING ENDED
Sept. 28, 1987	10:00 a.m.	11:40 a.m.
Oct. 5, 1987	4:00 p.m.	11:00 p.m.
Oct. 12, 1987	4:30 p.m.	10:00 p.m.
Oct. 19, 1987	4:30 p.m.	8:30 p.m.
Oct. 26, 1987	4:30 p.m.	8:30 p.m.
Nov. 2, 1987	4:30 p.m.	9:55 p.m.
Nov. 5. 1987	4:30 p.m.	9:00 p.m.
Nov. 9, 1987	4:30 p.m.	7:00 p.m.
Nov. 16, 1987	4:30 p.m.	8:45 p.m.
Nov. 21, 1987	9:00 a.m.	4:45 p.m.
Nov. 22, 1987	9:30 a.m.	3:30 p.m.
Nov. 23, 1987	4:30 p.m.	9:10 p.m.
Nov. 30, 1987	4:30 p.m.	10:05 p.m.
Dec. 7, 1987	4:30 p.m.	9:40 p.m.
Dec. 14, 1987	4:30 p.m.	7:35 p.m.
Dec. 21, 1987	4:00 p.m.	6:05 p.m.
Dec. 28, 1987	4:30 p.m.	9:20 p.m.
Jan. 4, 1988	4:30 p.m.	10:00 p.m.
Jan. 11, 1988	4:40 p.m.	10:00 p.m.
Jan. 18, 1988	3:30 p.m.	10:20 p.m.
Feb. 1, 1988	3:30 p.m.	9:30 p.m.

23. In addition to the above meetings of the entire Board various committees of the Board have met in meetings open to and attended by members of the public and the news media on the dates set forth on Exhibit 2.

24. In addition to meetings of the Board and various committees of the Board, the Board has held public hearings throughout the St. Louis metropolitan area at which the Board gave an opportunity to the citizens of St. Louis City and St. Louis County to address the Board and allowed citizens, municipalities and interested organization to make suggestions, statements and comments to the Board concerning the discharge of the Board's duties. Exhibit 3 is a true and accurate copy of the flyer distributed by the Board to announce their public hearings and contains a listing of the dates and places of such hearings.

25. The Board has heard numerous presentations by government representatives, university professors, experts from out-of-state, citizens and citizens groups. The Board retained a full-time administrator who is a professor from the University of Missouri, St. Louis. In addition, the Board engaged, a community relations consultant and a public accounting firm to provide various services in connection with the Board's work. Seven additional staff people, some of whom are faculty or graduate students from the University of Missouri, St. Louis have been retained to perform secretarial, research, drafting and other necessary services.

26. Plaintiffs knew on September 28, 1987 that the Board would be convened for the purpose of studying and developing a plan of municipal and county reorganization to be submitted to the voters of the City of St. Louis and St. Louis County, Missouri.

27. The minutes of the Board for October 5, 1987, attached hereto as Exhibit 4, adopted an attached timetable as tentative guidelines for the Board's work. Item 8 of the timetable read:

"Prepare Final Plan for submission to City and County Election Boards by February 15, 1988." Plaintiffs were aware of the Board's tentative timetable within a matter of several days after October 5, 1987.

28. The funds expended by the Defendant Members of the Board are provided from the general revenue funds of the City of St. Louis and St. Louis County.

29. The general revenue funds of the City of St. Louis and St. Louis County include taxes imposed on and paid by all taxpayers, including Plaintiffs and members of the proposed plaintiff class.

30. Plaintiff Quinn and counsel for plaintiffs attended a meeting with the officers of the Board on Monday, November 9, 1987. During that meeting, Plaintiffs' counsel stated to the Board officers that Plaintiffs' counsel was of the opinion that a freeholder requirement for service on the Board was a violation of the United States Constitution's Equal Protection rights of non-freeholders.

31. The original complaint filed in this action in the United States District Court for the Western District of Missouri on behalf of Plaintiffs was filed on November 10, 1987. That complaint named as parties defendant the State of Missouri and the Attorney General of the State of Missouri and sought a declaratory judgment that the freeholder requirement for service under Section 30 was a violation of the equal protection rights of non-freeholders.

32. Plaintiffs did not name Defendant Ashcroft, McNary, Schoemehl or the Board Members in the original complaint in this action and did not seek any injunctive relief in that complaint.

33. Plaintiffs' counsel caused a letter to be delivered to Defendant Wayne L. Millsap, Chairman of the Board, on November 10, 1987, the same day that the suit was filed. A true and accurate copy of that letter is attached hereto as Exhibit 5.

34. On Friday, November 13, 1987, at a hearing held by the Board and attended by Defendant Board Members Claude Brown and Henry Stolar, counsel for Plaintiffs stated to those members of the Board that suit had been filed to contest the legality of the Missouri constitutional provision under which the Board was operating, that it was Plaintiffs' counsel's opinion that a freeholder qualification for service on a Board was illegal. Plaintiffs' counsel also requested that the Board not file a plan or dissolve itself prior to judicial resolution of that issue.

35. On November 30, 1987 the original defendants in this action filed a Motion to Dismiss the original complaint and a Brief in Support of that motion.

36. On December 10, 1987 Plaintiffs filed a Brief in Opposition to the original defendants' Motion to Dismiss. Plaintiffs did not request oral argument on that motion.

37. On January 4, 1988 counsel for Plaintiffs' (on behalf of another client) attended a public meeting of the Board and presented the Board with a written statement which addressed several issues regarding some proposals being considered by the Board. In both the written statement and in a concurrent oral statement made to all members of the Board then in attendance, Plaintiffs' counsel stated that the question of the legality of the provision under which the Board operated was in pending litigation and he further stated that he urged the Board to await a resolution of the case before filing a plan and dissolving.

38. At its scheduled January 25, 1988 meeting, the Board had planned to discuss and attempt to resolve the fiscal components of the proposed plan and to discuss and attempt to resolve the various plan proposals which were before it. An additional meeting was scheduled for Wednesday, January 27, 1988 in anticipation that the Board would need to work more intensively toward concensus on the elements of a tentative plan which the Board hoped it would be able to present for community reaction and input.

39. As a result of the temporary restraining order issued by the District Court on January 25 and stayed by the Eighth Circuit Court of Appeals on January 27 (approximately forty-eight hours later), however, the Board did not hold two meetings as previously scheduled and the Board staff was not allowed to continue its work during the period the restraining order was in effect.

40. At the Board meeting held on February 1, the Board was able to approve in concept the elements of the plan to be tentatively proposed. The Board directed its staff to compile factual data regarding the effect of the plan concepts and to propose further specifics for each of the elements approved in concept.

41. The Missouri Constitution allows the Board to take up to one year from the date on which the membrs assumed their offices within which to file a plan.

42. The Board of Freeholders retained the services of legal counsel on September 28, 1987.

43. Defendant Governor John D. Ashcroft is a licensed attorney and former Attorney General of the State of Missouri. Defendant County Executive Gene McNary is a licensed attorney and former Prosecuting Attorney for St. Louis County. Defendant Morgan is a licensed attorney and former Justice and Chief Justice of the Supreme Court of Missouri. Defendants Boston, Hamel, Millsap, Stolar and Wilson are all licensed attorneys engaged in the active practice of law.

44. The City of St. Louis and St. Louis County had, prior to January 25, appropriated a total of $200,000.00 to the operations of the Board. The Board had paid out approximately $125,000.00 of this amount by January 25.

45. It is estimated that the cost of an election to submit any plan which the Board might file with the officials in general

charge of elections for the City of St. Louis and St. Louis County would cost the City and County an aggregate of not less than $450,000.00.

Respectfully submitted,

/s/ Kevin M. O'Keefe, Esq.
1015 Locust Street, Suite 420
St. Louis, Missouri 63101

/s/ Jess W. Ullom
222 South Central, Suite 900
Clayton, Missouri 63105
Attorneys for Plaintiffs

Simon B. Buckner
Assistant Attorney General
State of Missouri
Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
Attorney for Defendants
State of Missouri and
Governor John D. Ashcroft

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

/s/ Andrew J. Minardi
Associate County Counselor
7900 Forsyth Blvd.
Clayton, Missouri 63105
Attorney for Defendant
Gene McNary, St. Louis County
Executive

/s/ Eugene P. Freeman
Deputy City Counselor
City of St. Louis
Tucker & Market Street
St. Louis, Missouri 63103
Attorney for Defendant
Vincent C. Schoemehl, Jr., Mayor
City of St. Louis

/s/ Kenneth F. Teasdale

/s/ Thomas Cummings
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Attorneys for the Members of the
St. Louis City/County Board of
Freeholders

OF COUNSEL:

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY

EXHIBIT 1

A PETITION

to establish a board of St. Louis area property owners (freeholders) to study the governmental structures and responsibilities within St. Louis County and the City of St. Louis. Should a reorganization plan be recommended, there would be a vote of St. Louis County and City residents to determine whether or not they want to accept the plan.

To The Honorable Board of Election Commissioners for the COUNTY of St. Louis, Missouri:

The undersigned voters of the COUNTY of St. Louis, Missouri do hereby present this petition proposing the exercise of the powers granted to the people of the City of St. Louis and St. Louis County by Section 30 of Article VI of the Constitution of the State of Missouri for the purpose of formulating and adopting a plan to provide for the partial or complete government of all or any part of the County and City

VERIFICATION AFFIDAVIT

STATE OF MISSOURI, COUNTY OF ST. LOUIS I, _____, being first duly sworn, say that

(Print or type name of signer)	NAME (Signature)	ADDRESS (Street and City)	ZIP CODE
1			
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signed this page of the foregoing petition and each of them signed his/her name thereto in my presence. I believe that each has stated his/her name, street address and city, town or village correctly, and that such signer is a registered voter of the State of Missouri and County of St. Louis.

_____ _____
Signature of Affiant (person obtaining signatures) Address of Affiant

Subscribed and sworn to before me this ____ day of _____, 1987.

Circulated by: Citizens to Streamline Government
Craig Cohen, Treasurer, P.O. Box 11923, St. Louis, Missouri 63105

_____
Notary Public

IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

v.

Robert J. Quinn, Jr., et al.,
Defendants.

DEFENDANTS' ANSWER AND CROSS PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I

ANSWER

1. Defendants admit the allegations set forth in Paragraph 1 of Plaintiffs' petition.

2. Defendants admit the allegations set forth in Paragraph 2 of Plaintiffs' petition and, further answering, state that the persons so appointed by Plaintiff McNary are required to be owners of real property as well as electors of St. Louis County.

3. Defendants admit the allegations set forth in Paragraph 3 of Plaintiffs' petition and, further answering, state that the persons so appointed by Plaintiff Schoemehl are required to be owners of real property as well as electors of the City of St. Louis.

4. Defendants admit the allegations set forth in Paragraph 4 of Plaintiffs' petition and, further answering, state that the person so appointed by Plaintiff Ashcroft is required to be an owner of real property as well as a resident of Missouri residing other than in the City or County of St. Louis.

5. Defendants admit the allegations set forth in Paragraph 5 of Plaintiffs' petition.

6. Defendants admit the allegations set forth in Paragraph 6 of Plaintiffs' petition.

7. Defendants admit the allegations set forth in Paragraph 7 of Plaintiffs' petition.

8. Defendants admit the allegations set forth in Paragraph 8 of Plaintiffs' petition and, further answering, state that the "assertions" attributed to Defendants by Plaintiffs are true and correct statements of fact.

9. As to the allegations of Paragraph 9 of Plaintiffs' petition, Defendants state that petitions certified by the election authorities of the City of St. Louis and St. Louis County as being sufficient in number were filed with those election authorities, which petitions sought the appointment of owners of real property to a board of freeholders pursuant to the Act.

10. As to the allegations of Paragraph 10 of Plaintiffs' petition, Defendants admit the allegations contained therein and, further answering, state that the approval of the St. Louis County Council for the appointment of such members of the board of freeholders was also obtained and that each such appointee, at all times relevant herein, was an owner of real property and known to be such prior to appointment as aforesaid.

11. Defendants admit the allegations set forth in Paragraph 11 of Plaintiffs' petition.

12. As to the allegations of Paragraph 12 of Plaintiffs' petition, Defendants admit the allegations contained therein and, further answering, state that each such appointee, at all times relevant herein, was an owner of real property and known to be such prior to appointment as aforesaid.

13. Defendants admit the allegations set forth in Paragraph 13 of Plaintiffs' petition.

14. As to the allegations of Paragraph 14 of Plaintiffs' petition, Defendants admit the allegations contained therein and, further answering, state that such appointee was, at all times relevant here, an owner of real property and known to be such prior to appointment as aforesaid.

15. As to the allegations of Paragraph 15 of Plaintiffs' petition, Defendants admit that Plaintiff Millsap was elected as chairman of the board of freeholders by the members thereof but deny each and every other allegation contained in said paragraph.

16. As to the allegations of Paragraph 16 of Plaintiffs' petition, Defendants admit that the board members have employed staff and counsel, have held public and private meetings and have undertaken to exercise the power and authority conferred on them by the Act, but deny each and every other allegation contained in said paragraph.

17. As to the allegations of Paragraph 17 of Plaintiffs' petition, Defendants admit that a board of freeholders is obliged to file any plan it might propose within one year of its appointment, but deny each and every other allegation contained in said paragraph.

18. Defendants admit the allegations of Paragraph 18 of Plaintiffs' petition and, further answering, state that each of the "assertions" attributed to Defendants are true and correct statements of fact.

19. As to the allegations of Paragraph 19 of Plaintiffs' petition, Defendants admit that ownership of real property is a prerequisite for appointment to and membership on a board of freeholders and that the Plaintiff members of the board of freeholders were appointed as required by the Act. Further answering, Defendants state that, for the reasons set forth in Defendants' answers to the preceding Paragraphs and in Defendants' cross-petition set forth below and incorporated here by

reference, the facial and as-applied unconstitutionality of the Act prohibits any further attempt to exercise the authority conferred on a board of freeholders by the Act.

20. Defendants admit the allegations set forth in Paragraph 20 of Plaintiffs' petition.

21. Defendants admit that they have a legally protectable interest, that the parties have expressed adverse positions on the issues framed by the pleadings of the parties, and that judicial determination of the issues is appropriate, but deny that any of the Plaintiffs have any legally protectable interest in enforcement of or exercise of authority under an unconstitutional act.

22. As to the allegations of Paragraph 22 of Plaintiffs' petition, Defendants state that this Court should defer further action in this matter, other than the temporary and preliminary injunctive relief prayed by Defendants in their cross-petition, below, pending conclusion of certain proceedings between these same parties on these same issues in the cause styled *Quinn, et al. v. State of Missouri, et al.* previously heard and determined in the United States District Court for the Western District of Missouri and presently on appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

23. As to the allegations of Paragraph 23 of Plaintiffs' petition, Defendants state that further action other than granting of the temporary and preliminary injunctive relief prayed by Defendants in their cross-petition, below, would result in multiple and duplicitous litigation. Further answering, Defendants deny each and every other allegation set forth by Plaintiffs in said Paragraph.

24. Further answering, Defendants hereby incorporate by reference each and every allegation set forth in their cross-petition, below.

WHEREFORE, having fully answered, Defendants pray that Plaintiffs' petition be dismissed and that relief be granted to Defendants as prayed in Defendants' cross-petition.

II

DEFENDANTS' CLASS ACTION CROSS PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is a civil action pursuant to 42 U.S.C. §1983 for judgment declaring as unconstitutional under the United States Constitution, Article VI, §§30(a) and 30(b) of the Missouri Constitution of 1945, as amended (hereafter the "Act"), which provides for the selection and operation of a board of freeholders to propose a plan for intergovernmental relations between St. Louis County, Missouri, and the City of St. Louis, Missouri, and for the submission of said plan to the electorate of those political subdivisions. The substance of the Act was originally enacted in the Missouri Constitution of 1875 and most recently amended in 1966. A true copy of the Act is attached hereto and marked as "Exhibit A." Defendants also seek injunctive relief in implementation of the declaration of unconstitutionality of the Act.

2. Defendants invoke the jurisdiction of this Court under Article VI and the First, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution and under United States Code, Title 42, Chapter 21, §§1983 and 1988; §527.010 RSMo. (Declaratory Judgments), and §526.010 RSMo. (Injunctions).

3. Defendants challenge the Act as unconstitutional under the foregoing provisions of the United States Constitution.

4. Defendant ROBERT J. QUINN, JR. ("QUINN") is a resident of St. Louis County, Missouri and is the elected Missouri State Representative from the 80th District. Defendant QUINN is and has been since before January 1, 1987, to date, a taxpayer and a registered voter and elector of the County of St. Louis, Missouri, and is and has been a non-freeholder, owning no real property.

5. Defendant PATRICIA J. KAMPSEN ("KAMPSEN") is a resident of St. Louis County, Missouri and a practicing at-

torney within the metropolitan St. Louis, Missouri, area. Defendant KAMPSEN is and has been since before January 1, 1987, to date, a taxpayer and a registered voter and elector of the County of St. Louis, Missouri, and is and has been a non-freeholder, owning no real property.

6. Defendants QUINN and KAMPSEN bring this cause of action on their own behalf and on behalf of the entire class consisting of resident taxpayers, electors and non-freeholders of St. Louis County, Missouri, and of the City of St. Louis, Missouri, and also consisting of non-freeholder residents of the State of Missouri not residing in either the City of St. Louis or St. Louis County. Said class of taxpayers and resident electors and non-freeholders being so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class, and the claims of Defendants are typical of the claims of the class. Defendants shall fairly and adquatetely represent the interests of the class.

7. The STATE OF MISSOURI is one of the United States of America, and the Act is a constitutional enactment of said Plaintiff.

8. Plaintiff JOHN D. ASHCROFT is the Governor of the State of Missouri and the official responsible for appointing the representative to a board of freeholders who does not reside in either the City of St. Louis or the County of St. Louis, Missouri.

9. Plaintiff GENE McNARY is the County Executive (chief executive officer) of St. Louis County, Missouri, and the official responsible for appointing the representatives of St. Louis County to a board of freeholders organized pursuant to the Act.

10. Plaintiff VINCENT C. SCHOEMEHL, JR. is the Mayor of the City of St. Louis, Missouri, and the official responsible for appointing the representatives of the City of St. Louis to a board of freeholders organized pursuant to the Act. (Plaintiffs

Ashcroft, McNary and Schoemehl together may hereinafter be referred to as "the appointing authorities.")

11. Plaintiffs JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA H. BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, ALBERT H. HAMEL, WILLIAM J. HARRISON, WAYNE L. MILLSAP, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON (hereinafter referred to as "board members") are the individuals appointed to and acting as the board of freeholders for the City of St. Louis and St. Louis County, Missouri.

12. Plaintiffs' responsibilities, duties, acts, and obligations in the enactment, defense, implementation, and application of the Act are pursued and undertaken under the color of state law.

13. Plaintiff board members and the board of freeholders for the City of St. Louis and the County of St. Louis are authorized by the Act to spend unlimited tax money in their sole and unrestricted discretion, which tax money is paid by both freeholder and non-freeholder taxpayers of the City of St. Louis and St. Louis County. As of the date of filing of this Cross-Petition, approximately $400,000.00 has been appropriated from the public tax revenues of St. Louis City and County to pay for the expenditures of the freeholder board.

14. The Act on its face and as applied by Plaintiff appointing authorities discriminates between freeholders and non-freeholders and prohibits the right of named Defendants and other members of the defendant class from serving as members of the board established by the Act, in violation of Article VI and of the First, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

15. The Act on its face and as applied by Plaintiff appointing authorities deprives named Defendants and other members of the defendant class as non-freeholders of the equal protection of the laws by treating similarly situated classes differently and discriminatorily, with neither compelling nor rational justification for such classification, all in violation of Article VI and of the First, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

16. The implementation and effect of the Act creates a freeholder bias in any plan to be proposed, thus severely limiting the options of the electorate in the approval of any plan proposed, with neither compelling nor rational justification for such classification, all in violation of Article VI and of the First, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution.

17. Plaintiff board members have stated an intention to prepare and file a "plan" as provided in the Act with the election authorities of the City and County of St. Louis at the earliest possible time, whereupon the board would be dissolved. Defendants and members of the defendant class are now suffering and will continue to suffer irreparable injury by reason of the exercise of the powers provided under the Act by the Plaintiff board members and by reason of the continued expenditure of public funds by an unconstitutional body. Moreover, Defendants and members of defendant class are in imminent danger of further irreparable injury if Plaintiff board members should exercise the authority invested in such a board of freeholders and file a "plan" as provided in the Act prior to the conclusion of this litigation.

18. The named Defendants and members of the defendant class have no adequate remedy at law to preserve the status quo and avoid the infliction of further and continuing injury pending conclusion of these proceedings, and must rely on the equitable authority of this Court for preliminary relief as prayed hereafter.

WHEREFORE, named Defendants, individually and on behalf of all members of the defendant class, pray this Court to:

A) Certify the defendant class set forth in above Paragraph 6, pursuant to Missouri Rule of Civil Procedure No. 52.08; and

B) Issue a declaratory judgment holding said Act to be in violation of the rights of named Defendants and of members of the defendant class, as protected by Article VI and by the First, Ninth, Fourteenth, and Fifteenth Amendments to the United States Constitution; and

C) Issue a preliminary injunction to prohibit and enjoin:

1) all Plaintiffs from expending any public funds in support of the activities of the board of freeholders pursuant to the Act;

2) Plaintiff State of Missouri and Plaintiff board members from exercising or attempting to exercise any of the power or authority invested in a board of freeholders pursuant to the Act; and, in particular, from preparing or filing with the election authorities of the City of St. Louis and St. Louis County, Missouri, any "plan" pursuant to the Act; and

3) Plaintiffs Ashcroft, McNary and Schoemehl and their successors in office, from appointing any new, additional or replacement members to the present or any other board of freeholders;

all pending the conclusion of these proceedings.

D) Defendants further pray that this Court issue a permanent injunction to:

1) prohibit and permanently enjoin Plaintiff State of Missouri, and Plaintiffs Ashcroft, McNary and Schoemehl, and their successors in office, from appointing any representatives to any board of freeholders organized pursuant to the Act; and

2) prohibit and permanently enjoin the Plaintiff State of Missouri and the Plaintiff members of the board of freeholders from exercising or attempting to exercise any of the power or authority invested in a board of freeholders pursuant to the Act, and, in particular, from preparing or filing with the election authorities of the City of St. Louis and St. Louis County, Missouri, any "plan" pursuant to the Act; and, further, to prohibit and permenently enjoin said Plaintiff State of Missouri and Plaintiff members of said board of freeholders from expending any public funds for the operations of said board of freeholders.

E) Defendants further pray that this Court issue a temporary restraining order to restrain, prohibit and enjoin:

1) all Plaintiffs from expending any public funds in support of the activities of the board of freeholders pursuant to the Act;

2) Plaintiff State of Missouri and Plaintiff board members from exercising or attempting to exercise any of the power or authority invested in a board of freeholders pursuant to the Act, and, in particular, from preparing or filing with the election authorities of the City of St. Louis and St. Louis County, Missouri, any "plan" pursuant to the Act; and

3) Plaintiffs Ashcroft, McNary and Schoemehl and their successors in office, from appointing any new, additional or replacement members to the present or any other board of freeholders;

all pending further order of the Court and for the purpose of preserving the ability of the Court to provide an effective remedy, protecting the rights of Defendants and members of the defendant class, and maintaining the status quo and relationshp of the parties and the issues pending determination by the Court; and

F) Award to Defendants and to defendant class their reasonable attorneys' fees and expenses pursuant to 42 U.S.C. §1988.

G) Tax all costs herein against Plaintiffs.

H) Grant such other further relief as the Court may deem meet and proper under the circumstances.

Respectfully submitted,

SCHWARZ, PAPERNER &
RODEMEYER,

Howard Paperner, MBE# 23488
222 South Central, Suite 1004
Clayton, Missouri 63105
(314) 721-0300

AND

CZECH, HOFFMAN &
WALTHER,

Louis S. Czech, MBE# 14946
7912 Bonhomme, Suite 404
Clayton, Missouri 63105
(314) 863-4020

AND

UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE

Kevin M. O'Keefe, MBE# 23381
1015 Locust Street, Suite 420
St. Louis, Missouri 63101
(314) 621-9550

Attorneys for Defendants

By: /s/ Kevin M. O'Keefe

Jurat and Certificate of Service deleted.

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

vs.

Robert J. Quinn, Jr., et al.,
Defendants.

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

(May 12, 1988)

Come now Defendants and for their Motion for Summary Judgment pursuant to Missouri Supreme Court Rule 74.04 inform the Court that there are no genuine issues as to any material facts which require the introduction of additional evidence at trial. The facts presented in the stipulation of the parties and the reasonable inferences therefrom establish that Defendants are entitled to judgment on their cross petition as a matter of law for the following reasons:

1. The pleadings of all parties agree to the propriety of proceeding with this case as a class action in which the named Defendants respresent a class consisting of all registered voters in the City of St. Louis and St. Louis County who do not own real property and all non-property owners who are residents of the State of Missouri not residing in either the City or County.

2. Art. VI, Sec. 30 of the Missouri Constitution limits eligibility for service on a Board of Freeholders to persons who are freeholders.

3. In order to attain freeholder status, as that term is used in the Missouri Constitution, a person must own a freehold interest in real property. *Shively v. Lankford,* 174 Mo. 535, 74 S.W. 835, 838 (Mo. 1903).[1]

4. Every one of the forty-seven uses of the term "freeholder" in the Statutes of Missouri is consistent with the property ownership meaning of the term.[2]

5. In order to be eligible for appointment to a Board of Freeholders under Art. VI, Sec. 30 a person must be an owner of real property.

6. The Fourteenth Amendment to the Constitution of the United States guarantees equal protection of the laws to every citizen and prohibits discriminatory state enactments which abridge this guarantee.

7. A state enactment which limits eligibility for public office to only those persons who own property violates the Equal Protection rights of non-property owners and is unconstitutional. *Turner v. Fouche,* 396 U.S. 346, 362-363, 90 S.Ct. 532, 541, 24 L.Ed.2d 567 (1970); *Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159, 97 S.Ct. 2162, 52 L.Ed.2d 223 (1977).[3]

8. Art. VI, Sec. 30 of the Missouri Constitution on its face violates the Equal Protection rights of Defendants and the defendant class and is unconstitutional. The relief prayed by Defendants under 42 U.S.C. Sec. 1983 is appropriate and should be granted.

---

[1] Copy attached for reference.

[2] See supporting affidavit and attachments filed herewith by Defendants.

[3] Copies attached, together with the underlying state opinion reversed in *Chappelle,* for reference.

9. In addition to the facial invalidity of Art. VI, Sec. 30, the application of the provision in the creation of the present Board of Freeholders resulted in unconstitutional discrimination against Defendants and defendant class. The petitions calling for creation of the Board specifically required appointment of "property owners." *Stipulation of Fact #15 and Exhibit 1 thereto.* A property ownership qualification was actually applied and enforced in each of the appointing jurisdictions. *Stipulation of Fact #'s 17, 19, 21.*

10. Because the present Board of Freeholders is composed exclusively of property owners (*Stipulation of Fact # 14*) and because such a qualification was applied in appointing the present Board, a bias in favor of property owners on the part of the Board is manifest. The general concepts of the plan agreed upon by the present Board of Freeholders evidences such a bias in that it proposes to reduce property taxes and shift the burden of taxation from property owners to wage earners by the imposition of an earnings tax in St. Louis County.[4]

11. Thus, in addition to the facial invalidity of Art. VI, Sec. 30, the property ownership qualification of the Act has actually been applied in such a manner that the Equal Protection rights of Defendants and defendant class have been violated, mandating relief under 42 U.S.C. Sec. 1983 as prayed by Defendants.

WHEREFORE, Defendants move for summary judgment in favor of Defendants declaring that Art. VI, Sec. 30 of the Missouri Constitution, on its face and as applied, violates the Fourteenth Amendment to the Constitution of the United States and granting injunctive and other relief as set forth in the proposed Order submitted herewith.

---

[4] See supporting affidavit and attachments filed herewith by Defendants.

SCHWARZ, PAPERNER &
RODEMYER,

Howard Paperner, MBE# 23488
222 South Central, Suite 1004
Clayton, Missouri 63105
(314) 721-0300

And

CZECH, HOFFMAN &
WALTHER,

Louis S. Czech, MBE# 14946
7912 Bonhomme, Suite 404
Clayton, Missouri 63105
(314) 863-4020

And

UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE

Kevin M. O'Keefe, MBE# 23381
1015 Locust Street - Suite 420
St. Louis, Missouri 63101
(314) 621-9550

Attorneys for Defendants

By: /s/ Kevin M. O'Keefe

Cases Appended to original and Certificate of Service Deleted

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

vs.

Robert J. Quinn, Jr., et al.,
Defendants.

AFFIDAVIT IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

State of Missouri)
) SS
County of St. Louis)

Comes now Kevin M. O'Keefe, of lawful age, being duly sworn upon his oath, and deposes and states that he is an attorney licensed to practice law in the State of Missouri and co-counsel for Defendants in the above cause; that the attached synopsis of statutory uses of the term "freeholder" was prepared by affiant and is comprehensive and accurate; that the attached summary of components of a "proposed plan" was provided to affiant by counsel for the St. Louis City-County Board of Freeholders and that it accurately reflects the plan approved in general concept by the St. Louis City-County Board of Freeholders in exercise of the authority of such a body under the provisions of Art. VI, Sec. 30(a) and (b) of the Constitution of the State of Missouri; and that the foregoing is based upon affiant's personal knowledge.

Further affiant sayeth not.

/s/ Kevin M. O'Keefe

Certificate of Service Deleted

EXHIBIT A ON MOTION

STATUTORY USES OF "FREEHOLDER" IN MISSOURI

SECTION	DESCRIPTION
49.300	Procedures for County Courts to initiate condemnation actions. Refers to establishment of roads pursuant to petition of freeholders under Chapter 228, infra.
54.160	In the event that County Treasurer forfeits bond for faithful performance of duties regarding collection and retention of school funds, County Clerk or any freeholder may initiate action to collect under the bond. NOTE: school funds derived primarily from property taxes, collection of bond proceeds benefits such tax payers.
61.071	Inspections of conditions of disrepair of public roads by highway administrator in First Class Counties required upon written complaint of "three or more freeholders of the county."
61.240	Similar provision as 61.071 for 2nd, 3rd and 4th Class Counties.
64.350	"The members of the planning and recreation commission [for 2nd Class Counties] shall be freeholders and electors of the county and known for their intelligence and integrity and shall have resided in such county for a period of five years prior to the date of their appointment."

64.520 Members of the County Planning Commission in 2nd and 3rd Class Counties are to be appointed from the unincorporated part of each township in the county, each is to be "resident freeholder" of township represented.

64.660 Provides for establishment of County Board of Zoning Adjustment in 2nd and 3rd Class Counties. "The board shall consist of five freeholders . . ."

64.805 Same as 64.520, loc. cit., alternative form of County planning and zoning.

64.870 Same as 64.660, loc. cit., alternative form of planning and zoning.

65.550 In the event that a township in a county shall fail to organize as provided, County Court can undertake organization thereof "upon the affidavit of any freeholder of said township." NOTE: Section is applicable only after failure of "any twelve householders" to undertake such township organization.

71.590 Condemnation of property for street railways by cities. Provides for "three disinterested freeholders" to assess damages and benefits to property.

88.013 Condemnation for public works by cities. Assessment of damages suffered by owners of real estate condemned to be by "three disinterested commissioners, freeholders of property in said city . . ."

88.017 Condemnation judicial proceedings. "[O]wners of a freehold in the property to be appropriated" are to named as defendants.

88.023 Condemnation damages to be assessed by "three freeholders, residents of the city . . ."

88.080 Assessment of damages caused by street grading to be by "three disinterested freeholders of such city."

89.080 Municipal Board of Zoning Adjustment "shall consist of five members, who shall be freeholders."

91.260 Municipal Board of Waterworks Commissioners "shall be composed of three freeholders of the city."

160.011 For purposes of 12 Chapters relating to schools and libraries, "freeholder" is defined as meaning "any person who has an estate in land which may be inherited or an estate in land for life or for an indeterminate period, including any tenant by the entireties."

162.401 In the event of forfeiture of bond by treasurer of certain school districts, the secretary of the school board or any freeholder may cause suit to be brought to collect under the terms of the bond. See NOTE under Sec. 54.160, supra.

162.541 Same as 162.401 for other school districts.

178.290 Night schools in certain school districts may be established "upon receipt of a petition signed by fifty or more freeholders." NOTE: school expenses borne primarily by real property taxpayers.

228.020 County Court may establish public road on petition. "Such petition shall be signed by at least twelve freeholders of the municipal township or townships through which said proposed road

may run, three of whom shall be of the immediate neighborhood . . ." The petition is also required to specify the "amount of damages" claimed to their land by the freeholders signing the petition. *Also* provides that petitioners may be "freeholders of such adjoining county and of the municipal township or townships thereof" if the road is to lie in more than one county. NOTE: Also see Sec. 228.040 which refers to the "petitioners give[ing] the right of way for the proposed road . . ."

228.050 Same subject as 228.020. Provides that objections to proposed road may be filed by "twelve or more freeholders residing" in the requisite area.

228.110 Vacation of public roads by county may be on application of "any twelve freeholders of the township or townships through which the road runs." *Also* provides that county court is to hold hearing on the proposed vacation if objections in writing are filed by "twelve freeholders, residents of such township . . ."

228.180 Condemnation for public roads by counties. Damages to be assessed by "jury of six freeholders."

242.240 Condemnation for purposes of drainage districts. Assessment of damages and benefits to be by "three commissioners, who shall be freeholders residing within the state of Missouri and who shall not be landowners in said district nor of kin . . . to any person owning land in said district."

243.50 Same as Sec. 242.240 for other classes of counties. Repeats identical language regarding where freeholders' land may be located.

243.170 District Engineer for drainage districts required to post a bond. Bond may be signed by "two resident freeholders in the county in which such district has been organized . . ." NOTE: real property of freeholders is sufficient to insure that a resource will be available to recover damages in the event of a breach of duty by engineer.

243.360 Same as Sec. 243.170 as to bond required of county collector of revenue with regard to drainage district funds.

243.410 Same as Sec. 243.170 as to bond required of county treasurer with regard to drainage district funds.

244.030 Assessment of damages on establishment of private drainage rights on property of another to be by "three disinterested freeholders, residents of the county, . . ."

245.110 Assessment of damages on establishment of levee district to be by three commissioners "who shall be freeholders residing within the state of Missouri, and who shall not be landowners in said district nor of kin . . . to any person owning land in said district."

245.515 On forfeiture of bond of county treasurer with respect to levee district funds, any "freeholder of the district" may initiate action to recover on the bond.

257.040 Concerns the establishment of river basin conservancy districts. Provides that proceedings to establish a district are initiated by a petition and ". . . petitioners to be resident freeholders, and may be public corporations . . ." *Also* provides

that the petitioners must be ". . . owners of real estate and other property . . ." and willing to pay for the costs of proceedings to establish the district. *Also* states as follows: "In determining when a requisite number of freeholders have signed the petition, the court shall be governed by the names as they appear upon the tax records, which shall be prima facie evidence of ownership."

257.450 Procedure to disincorporate river basin concervancy district. Disincorporation to occur upon petition of "the number of freeholders" necessary to establish district under Sec. 257.040, supra.

262.290 County agricultural and mechanical society may be established by county court upon petition by "fifty or more freeholders within this state . . ." if the county court is ". . . satisfied that such persons are freeholders of this state . . ."

267.100 ". . . [A]ny ten freeholders, residents of this state . . ." may demand that the state commissioner of agriculture provide the services of a veterinarian by a petition which begins "We, the undersigned citizens, freeholders of the county of _____, . . ."

270.250 A bull, ram or boar hog running at large may be castrated "after three days' notice, signed by three freeholders of the township where . . ." the animal was running at large.

271.030 An individual taking up a stray animal must post a bond for the return thereof to its owner. On breach of the bond "any freeholder, to the use of the school fund, . . ." may bring suit on the bond. See NOTE under Sec. 54.160, supra.

273.110 Custodian of livestock or poultry injured or killed by dogs may seek damages from the county dog license fund if he ". . . with two other credible freeholders of the county, not kin to him by blood or marriage or not in his employ . . ." submits an affidavit requesting such damages.

278.280 Determination of assessments to tracts of land in soil conservation subdistricts to be made by "three appraisers, who shall be freeholders residing in the state of Missouri, and who shall not be landowners in said subdistrict."

380.471 Mutual property insurance companies may invest in mortgages on real estate of appropriate value. "The value of such real estate shall be determined by a valuation made under oath by two freeholders of the county where such real estate is located."

388.420 Railroads may take construction materials from private property. Damages suffered by the owner of the lands from which the material is taken to be determined by "three commissioners, who shall be freeholders and disinterested." Failure of "any freeholder" to perform the duties assigned under the statute results in payment of damages to the party seeking recovery.

391.160 System for payments among street railroad companies for use of tracks of another company. Each company to provide the "name and address of one disinterested freeholder" to assess damages on behalf of the company. Municipality to appoint ". . . a third disinterested freeholder to act as commissioner and shall also appoint one such freeholder to represent . . ."

either company not nominating its own representative.

393.050 Assessment of damages on condemnation by utility companies. Determination of damages to be made by "three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate . . ." is located.

523.010 Condemnation damages. "[T]hree disinterested freeholders, as commissioners, . . ." to assess damages.

523.040 Condemnation proceedings. Damages to be assessed by "three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is located . . ."

EXHIBIT B ON MOTION

The St. Louis City-County Board of Freeholders (the "Board") has approved in general concept the following components of a proposed plan:

• The reorganization of municipal governments in St. Louis County into 42 separate municipalities with a Transition Commission to assist in needed adjustments. The presently contemplated boundaries of the municipalities are indicated on the attached Exhibit 1.

• The reorganization of County government and the manner in which County governmental functions are financed.

• A St. Louis City/County economic development district to promote jobs, economic growth and development in the City of St. Louis and St. Louis County.

• A St. Louis City/County metropolitan council to evaluate City/County problems and needs and to propose recommendations for solutions to the citizens of the City and County.

• A plan for financing components of the proposed plan which includes a 1% earnings tax in St. Louis County, a rollback of the County property tax, a 6% nonresidential gross receipts tax on utilities in St. Louis County, a modified formula for sales tax distribution in St. Louis County, earning tax revenue sharing among municipalities and financing provisions for the St. Louis City/County economic development district and metropolitan council.

• A plan for reorganization of the delivery of fire protection and emergency medical service in St. Louis County.

The Board and staff are working on detailed development of the general concepts included in the proposed plan.

Map reproduced in original deleted.

MUNICIPAL ALIGNMENTS FOR 42-CITY MAP

1. Black Jack*	Includes Black Jack & Unincorporated area
2. Florissant	Includes Florissant & Unincorporated area
3. Hazelwood	Includes Hazelwood & Unincorporated area
4. Bridgeton	Includes Bridgeton, Bridgeton Terrace & Unincorporated area
5. Bellefontaine Neighbors	Includes Bellefontaine Neighbors, Riverview & Unincorporated area
6. Moline*	Includes Moline Acres & Unincorporated area
7. Ferguson	Includes Ferguson, Calverton Park, Cool Valley, & Dellwood & Unincorporated area
8. Berkeley	Includes Berkeley & Kinloch
9. St. Ann	Includes St. Ann & Unincorporated area
10. Maryland Heights	Includes Maryland Heights & Champ & Unincorporated area
11. Overland	Includes Overland, Charlack, Sycamore Hills, Vinita Park & Unincorporated area
12. St. John	Includes St. John, Bel Ridge, Breckenridge Hills, Edmundson, Woodson Terrace & Unincorporated area

13. Normandy	Includes Normandy, Bellerive, Bel-Nor, Beverly Hills, Glen Echo Park, Greendale, Hillsdale, Norwood Court, Northwoods, Pasadena Hills, Pasadena Park, Pine Lawn, Uplands Park, Velda Village, Velda Village Hills & Unincorporated area
14. Pagedale	Includes Pagedale, Hanley Hills, Vinita Terrace, Wellston & Unincorporated area
15. University City	As Is (Essentially); Includes University City & small portion of unincorporated area on Washington University campus
16. Olivette	Includes Olivette & Unincorporated areas
17. Creve Coeur	Includes Creve Coeur, Westwood & Unincorporated area
18. Jennings	Includes Jennings, Country Club Hills, Flordell Hills & Unincorporated area
19. Town & Country	Includes Town & Country, Country Life Acres & Unincorporated area
20. Frontenac	Includes Frontenac, Crystal Lake Park, & Huntleigh
21. Ladue	As Is
22. Clayton	As Is
23. Richmond Heights	As Is
24. Brentwood	As Is
25. Maplewood	As Is

26. Shrewsbury	Includes Shrewsbury, Mackenzie, Marlborough & Unincorporated area
27. Webster Groves	As Is
28. Rock Hill	As Is
29. Glendale	Includes Glendale, Oakland & Warson Woods
30. Crestwood	Includes Crestwood & Unincorporated area
31. Sunset Hills	Includes Sunset Hills & Unincorporated area
32. Affton*	Includes Grantwood Village, Lakeshire, St. George, Wilbur Park & Unincorporated area
33. Mehlville*	Includes Bella Villa & Unincorporated area
34. Fenton	Includes Fenton, Peerless Park, Valley Park & Unincorporated area
35. Kirkwood	Includes Kirkwood & Unincorporated area
36. Des Peres	Includes Des Peres & Unincorporated area
37. Manchester	Includes Manchester, Twin Oaks, Winchester & Unincorporated area
38. Ballwin	Includes Ballwin & Unincorporated area
39. Eureka	Includes Eureka & Unincorporated area
40. Ellisville	Includes Ellisville & Unincorporated area

41. Chesterfield*	Includes Clarkson Valley & Unincorporated area
42. Jamestown*	All Unincorporated area

*Names used only to help identify the area. Names are to be decided by the residents of the area.

NOTE: Lambert International Airport not included in any municipality and is an issue being investigated.

No current municipality is divided. All proposed municipalities leave current jurisdictions "as is" or combine them intact with other existing municipalities and/or unincorporated area.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 572 794

Team B

Wayne L. Millsap, et al.,
Plaintiffs,

v.

Robert J. Quinn, Jr., et al.,
Defendants.

REPLY OF PLAINTIFFS TO DEFENDANTS' "CROSS PETITION" FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Come now plaintiffs and for their reply to defendants' "Cross Petition" For Declaratory Judgment And Injunctive Relief answer and reply as follows:

1. Admit each and every averment of paragraphs 3, 7, 8, 9, 10, 11 and 12;

2. Deny each and every averment of paragraphs 2, 6, 14, 15, 16 and 18;

3. As to paragraph 1, admit that Article VI, Sections 30(a) and 30(b) Missouri Constitution of 1945, as amended, are as they provide; admit that the instant "Cross Petition" purports to be a constitutional attack on the sections of the Missouri Constitution previously identified; and deny each and every other averment of said paragraph 1;

4. As to paragraph 4, admit each and every averment to the said paragraph 4 except that plaintiffs deny that defendant Quinn is a "nonfreeholder" under said constitutional provisions;

5. As to paragraph 5, admit each and every averment of said paragraph except that plaintiffs deny that Patricia Kampsen is a "nonfreeholder" under said constitutional provisions;

6. As to paragraph 13, admit that plaintiff board members and the Board of Freeholders for the City of St. Louis and the County of St. Louis are authorized by the Act to spend tax money which tax money is paid by taxpayers of the City of St. Louis and St. Louis County and that as of the date of the filing of the Cross Petition approximately $400,000 has been appropriated from the public tax revenues of St. Louis City and County to pay for expenditures of the freeholder board; plaintiffs deny each and every other averment of said paragraph 13;

7. As to paragraph 17, admit that plaintiff board members have stated an intention to prepare and file a "plan" as provided in the Act with the election authorities of the City and County of St. Louis but deny each and every other averment of said paragraph.

8. For further answer, plaintiffs state that defendants will not sustain irreparable harm and injunctive relief is not authorized.

9. For further answer, plaintiffs state that defendants' "Cross Petition" fails to state a claim against plaintiffs upon which relief can be granted.

10. For further answer, plaintiffs state that the defendants' "Cross Petition" fails to allege facts sufficient to show a case or controversy for proper judicial resolution.

11. For further answer, plaintiffs state that defendants' "Cross Petition" claim is barred by the Common Law and the Eleventh Amendment to the United States Constitution.

12. For further answer, plaintiffs state that each of them has acted and will continue to act according to said constitutional provisions (i.e. Act) in legislative roles and as a consequence each enjoy legislative immunity from suit by the defendants in damages, declaratory relief and injunction.

WHEREFORE, having duly replied to the "Cross Petition" of defendants, plaintiffs herein pray that they may go hence at defendants' costs with respect to the Cross Petition for Declaratory Judgment and Injunctive Relief and for such other relief as in the premises are just and meet.

ARMSTRONG, TEASDALE, KRAMER, VAUGHAN & SCHLAFLY

By Thomas Cummings
Kenneth F. Teasdale #17248
Thomas Cummings #21448
Thomas B. Weaver #29176
Jordan B. Cherrick #30995
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

Attorneys for members of the St. Louis City-County Board of Freeholders

JAMES L. WILSON
ST. LOUIS CITY COUNSELOR

By Eugene P. Freeman
Eugene P. Freeman #14608
Deputy City Counselor,
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
(314) 622-3366

Attorneys for Plaintiff Mayor Vincent C. Schoemehl, Jr.

ATTORNEY GENERAL
WILLIAM L. WEBSTER

By Peter Lumaghi
Simon B. Buckner #33455
Peter Lumaghi #24160
Assistant Attorneys General
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 531-4207

Attorneys for Plaintiffs The State of Missouri and Governor John D. Ashcroft

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

By Andrew J. Minardi
Andrew J. Minardi #18955
Assistant County Counselor
41 South Central
Clayton, Missouri 63105
(314) 889-2042

Attorney for Plaintiff County Executive Gene McNary

Certificate of Service Deleted

APPELLANT'S BRIEF

No. 88-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

VS.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal from The Supreme Court of Missouri

BRIEF FOR THE APPELLANTS

JESS W. ULLOM
MARK D. MITTLEMAN
KAVENEY, BEACH, BOND, ULLOM & BURCKE
222 South Central, Suite 900
St. Louis, Missouri 63105
(314) 863-8484

KEVIN M. O'KEEFE*
*(*Counsel of Record*)
CHARLES W. BOBINETTE
UTHOFF, GRAEBER, BOBINETTE & O'KEEFE
906 Olive Street, Suite 300
St. Louis, Missouri 63101
Telephone: (314) 621-9550

Attorneys for Appellants

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED

1. Do all citizens of a state have a constitutional right to be considered for public service on a tax-supported public body without being discriminated against by a state law which limits eligibility for membership on that body to owners of real property?

2. Does the Fourteenth Amendment's prohibition against invidious discrimination by a state against one segment of its citizens apply to a tax-supported public body granted the exclusive authority to write a comprehensive charter to reorganize government functions and financing for presentation to the electorate by referendum?

3. In reviewing a challenge to discrimination in eligibility for service on a tax-supported public body exclusively authorized to draft a plan of governmental reorganization for submission to the electorate, is traditional equal protection analysis requiring a rational basis for the eligibility limitation sufficient, or do such circumstances require a heightened level of scrutiny?

PARTIES

Appellants, Robert J. Quinn, Jr. and Patricia J. Kampsen, are residents and registered voters of St. Louis County, Missouri, who do not own real property and are representatives of a class consisting of registered voters of the State of Missouri who do not own real property.

Appellees Wayne L. Millsap, Chairman, Joseph S. Balcer, Robert L. Bannister, Sandra Hasser Bennett, Allen S. Boston, Claude Brown, William G. Cocos, Jr., Jo Curran, Albert H. Hamel, Thomas P. Dunne, C. Fran Emerson, Gretta Forrester, William J. Harrison, J. P. Morgan, Catherine Rea, Daniel Schlafly, Henry S. Stolar, Lucille Walton and Margaret Bush Wilson are members of the St. Louis City-County Board of Freeholders and comprise all the members of the said Board of Freeholders.

Appellee the State of Missouri is one of the fifty United States. The provision at issue in this case is Article VI, Sections 30 (a) and (b) of the Constitution of the State of Missouri, an enactment of Appellee State of Missouri.

Appellee John D. Ashcroft is the Governor of the State of Missouri.

Appellee Gene McNary is the County Executive of St. Louis County, Missouri.

Appellee Vincent C. Schoemehl, Jr. is the Mayor of the City of St. Louis, Missouri.

Appellees Ashcroft, McNary and Schoemehl are the authorities responsible for appointing members of the Board of Freeholders.

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Cases Cited:

No. 88-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

vs.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal from The Supreme Court of Missouri

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

This case is an appeal from the Supreme Court of Missouri. On September 23, 1988, the Missouri Supreme Court, en banc,

entered its judgment holding that, while membership on the Board of Freeholders was restricted to real property owners, the Fourteenth Amendment to the United States Constitution is not applicable because a Board of Freeholders does not exercise general governmental powers. The opinion of the Missouri Supreme Court is officially reported at *Millsap v. Quinn,* 757 S.W.2d 591 (Mo.banc 1988). The slip opinion, number 60688, dated September 23, 1988, is reproduced at *S.J., A-1*

Appellants had appealed to the Missouri Supreme Court from an adverse decision by the trial court. On May 24, 1988, the Honorable Arthur Litz of the Circuit Court of St. Louis County, State of Missouri, entered a Memorandum and Judgment declaring Article VI, §§ 30(a) and (b) of the Constitution of the State of Missouri to be valid and in compliance with the Constitution of the United States, and granting Respondents' Motion for Summary Judgment. The unreported opinion, cause number 572794, is reproduced at *S.J., A-9.*

As set forth in the Statement of the Case, *infra,* the parties to the case in this appeal are also the parties in the associated case of *Quinn v. State of Missouri.* That matter was originally tried in the United States District Court for the Western District of Missouri and currently is on appeal to the United States Court of Appeals for the Eighth Circuit.

In that case, Appellants sought, and the district court granted, the same declaratory and injunctive relief denied by the Supreme Court of Missouri in this case. The state court proceedings were initiated when, on the day prior to trial in the district court, the federal court defendants (Appellees here) filed an action against the federal court plaintiffs (Appellants here) for parallel declaratory relief as to the validity of Article VI, §§ 30(a) and (b). Because of the relevancy of the proceedings in that associated case, the judgments and orders of the district court and the court of appeals are reproduced in chronological order at *S.J., A-28 through A-60.*

JURISDICTION

This case is a class action suit pursuant to Title 42 U.S.C. § 1983 for declaratory judgment and injunctive relief regarding the constitutionality of Article VI, §§ 30(a) and (b) of the Missouri Constitution. The Sections in issue establish a system for the appointment and operation of a Board of Freeholders to draft a plan for reorganization of local governments in the area of the City of St. Louis and St. Louis County, Missouri, and the method of adopting and effectuating such a plan.

This case is an appeal from a decision of the Supreme Court of Missouri, the highest court of the State of Missouri. *Mo. Const., Art. V, § 2.* The judgment of the Supreme Court of Missouri was entered on September 23, 1988. No motion for rehearing was filed and the judgment was final on that date.

Notice of Appeal to the Supreme Court of the United States was filed on December 16, 1988 with the clerk of the Supreme Court of Missouri, and a copy of said Notice was also mailed to the clerk of the Circuit Court of St. Louis County, the court wherein the case was previously tried, by first class U.S. Mail, postage prepaid. *Rule 10.3, Supreme Court Rules.* A copy of the Notice was mailed by first class U.S. Mail, postage prepaid, to counsel of record for all parties to the proceedings as shown on the copy of said Notice reproduced at *S.J., A-22. Rules 10.2, 28.3, Supreme Court Rules.*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) for review by direct appeal of a final judgment rendered by the highest court of the State of Missouri. This cause draws in question the validity of Article VI, §§ 30(a) and (b) of the Constitution of the State of Missouri on the grounds that said Sections are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The decision from which this appeal is taken was in favor of the validity of said sections. *28 U.S.C. § 1257 (2).*

The date of the final decision of the Supreme Court of Missouri, September 23, 1988, was less than ninety days after June 27, 1988. *Pub. L. 100-352, §§ 3, 7, June 27, 1988, 102 Stat. 662, 664.*

Therefore, this Court has appellate jurisdiction of the case.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, §§ 30(a) and 30(b) of the Constitution of the State of Missouri

Article VI, Section 30 of the Missouri Constitution provides a system by which a board of freeholders may be convened for the purpose of drafting and submitting to the voters of the City of St. Louis and St. Louis County a plan:

> (1) to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the City of St. Louis; or, (2) to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or, (3) to enlarge the present or future limits of the city by annexing thereto part of the territory of the

> county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or, (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or, (5) to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county.

A board of freeholders consists of nineteen members appointed by the Mayor of St. Louis and the County Executive of St. Louis County (nine each) and the Governor of Missouri (one). Expenses of the board are paid equally by the city and county. The board is allowed one year to draft and file a plan to implement the powers outlined above. Upon filing, the plan is submitted to an election. If approved by separate majorities in the city and county the plan is adopted as the organic law of the territory and supersedes conflicting state statutes, local charters and ordinances.

The full text of the constitutional provision is set forth and reproduced at *A-1. Rule 15.1(f), Supreme Court Rules.*

STATUTES INVOLVED

Title 28, United States Code

§1257. State courts; appeal; certiorari

> Final judgments or decisions rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Title 42, United States Code:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Introduction

A board of freeholders is an ad hoc public body of nineteen appointed members created under the Missouri Constitution. It has broad and exclusive powers to draft a plan for governmental and territorial reorganization in St. Louis City and County which is then submitted to the voters for approval. Appellants Robert Quinn, Patricia Kampsen, and the class they represent are ineligible for consideration to serve on a board of freeholders, solely because they do not own real property.

Each member of a freeholder board must meet two qualifications established by the Missouri Constitution prior to appointment: each must be both an elector (registered voter) and a freeholder. Each appointing authority and his staff applied these qualifications during their separate consideration of appointments to the present Board. All of the Board's members met both qualifications. The appellant class fails on only the freeholder requirement.

The Board has consistently referred to itself as the "Board of Freeholders" throughout its own proceedings and is so known by the media and the general public of St. Louis.

Appellants filed suit in federal district court and succeeded at trial in obtaining a declaratory judgment that the freeholder requirement violated the Equal Protection Clause of the United States Constitution both on its face and as applied. However, the Eighth Circuit reversed the judgment in a split panel decision without opinion, stating the district court should have abstained in favor of a state court suit filed by the Freeholders the day before the federal court trial.

The state court pleadings merely rearranged in mirror image the same parties and relief sought by each side in the federal court. It is the state case which is currently before this Court, after both the state trial court and the Missouri Supreme Court held the freeholder requirement does not violate the Equal Protection Clause of the Fourteenth Amendment.

Appellants Quinn and Kampsen

Robert Quinn and Patricia Kampsen are taxpayers, registered voters and residents of St. Louis County. Quinn is also currently serving his second elected term in the Missouri state legislature and Kampsen is a practicing attorney licensed by Missouri. *J.A. 18, para. 1, 3.* Neither owns real property and for purposes of this litigation they have been certified in both the federal and state suits as representative of a class of all registered voters of the state who do not own real property. *J.A., para. 11, 12.*

The number of members in this specific class is not known because voter registration records are not maintained by property ownership. However, census data discloses the ratios of renter occupied and owner occupied housing units within St. Louis City and St. Louis County. St. Louis County housing units are divided among 89,373 renter occupied and 255,156

owner occupied, while in the City of St. Louis the respective numbers are 97,633 rented and 80,415 owned. *Bureau of Census Report Table H-1, pp. H-3 and H-6 (1980).* Thus, the class represented by Appellants is potentially 26 percent of St. Louis County residents and a majority, 55 percent, of St. Louis City residents. Nationally, the ratio of households owing their homes versus those renting is 64 percent to 36 percent, according to studies cited in a recent article in Forbes magazine. *Forbes, March 20, 1989, "House Hunting? Read This First," pp. 119, 120.*

The Freeholder Law and Process

Since 1876 the City of St. Louis and the adjacent St. Louis County have been separate and distinct governmental and geographic entities, each having its own executive branch and legislative body. The City is recognized as a separate county of the State of Missouri, performing those functions common to counties (for example, property assessment, recording of deeds, and the operation of a branch of the state judicial system) in addition to standard municipal services (such as police, fire, sanitation and licensing). *Mo. Const., Art. VI, § 31.* St. Louis County is organized in the traditional fashion, performing state-delegated objectives while municipal services within its boundaries are furnished predominantly by cities, fire districts and other municipal corporations.

The Missouri Constitution provides the exclusive procedure for the City and County to consolidate or reorganize their governments by permitting the creation of a board of freeholders on an ad hoc basis upon petitions signed by a requisite number of registered voters. *Mo. Const., Art. VI, § 30(a), A-1.* When activated the board has a term of one year to draft a plan:

1. to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or

2. to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or

3. to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or

4. to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or

5. to formulate and adopt any other plan for the partial or complete government of all or any part of the city and county.

Upon its completion, the freeholder board's plan is automatically submitted to area voters for approval or rejection in toto. *Mo. Const., Art VI, § 30(a); A-3.*

A board consists of nineteen members, who are appointed by three different authorities. The Mayor of St. Louis appoints nine electors of the City. Nine electors of the County are appointed by the County Executive. The Governor appoints the nineteenth member, who must reside in the state, but outside both the City and County. All members must be electors (registered voters) and freeholders. The City and County appointments are subject to approval by the legislative bodies of those respective jurisdictions. *Mo. Const., Art VI §§ 30(a) and (b); A-2.*

During its year of activity the freeholder board's expenses are paid equally from the general revenue funds of the City and the County. *Mo. Const., Art VI § 30(b); A-2.* These funds derive

from various local taxes, including taxes imposed on all taxpayers irrespective of whether they own real property. *J.A. 25, ¶28, 29.*

After the freeholders have drafted and adopted a plan, an election is held on a date set by them. If the plan receives the approval of separate majorities in the City and County, it becomes "the organic law of the territory therein defined, and shall take the place of and supersede all laws, charter provisions, and ordinances inconsistent therewith." *Mo. Const., Art. VI, § 30(b), A-3.*

The Present Board of Freeholders

The present board of freeholders was formed in September 1987 on the basis of petitions "to establish a board of St. Louis area property owners (freeholders) . . . for the purpose of formulating and adopting a plan to provide for the partial or complete government of all or any part of the County or City." *J.A. 20, ¶15; J.A. 30, Exhibit 1.*

Rev. Paul C. Reinert S.J., president emeritus of St. Louis University, was an initial selection of Mayor Schoemehl as one of the City appointees to the Board of Freeholders. Father Reinert, in accord with his vow of poverty as a Roman Catholic Jesuit priest, owns no real property. Legal counsel for the City of St. Louis advised Mayor Schoemehl that members of the Board of Freeholders were required by law to have an ownership interest in real property. Thereafter, Father Reinert was no longer considered by the Mayor for appointment. *J.A. 22, ¶19, 20.*

Likewise, the County Counselor, the attorney for St. Louis County, advised the staff of County Executive McNary, who is also a lawyer, that an ownership interest in real property was a legal qualification for membership on the Board. They then confirmed that each of the County appointees was in fact qualified in that respect. *J.A. 21, 17, ¶17, 43.*

Governor Ashcroft stipulated he specifically required ownership of real property as a qualification on his appointment of the nineteenth board member. Governor Ashcroft is also a lawyer and formerly served as Attorney General of Missouri. *J.A. 21, 27, ¶21, 43.*

The Board of Freeholders held their first meeting on September 28, 1987. All the members were, in fact, owners of real estate. *J.A. 20, ¶14.* They continued to hold numerous meetings and hearings over the course of the following year, all of which were conducted in accord with the provisions of the state open meetings law which applies to all public bodies. *J.A. 22-24, ¶22-24.* The Board has now filed a plan which Art. VI, § 30 requires voters to accept or reject in its entirety and without modification.

The board initially scheduled that election to be held on June 20, 1989. In separate litigation a judge of the Circuit Court of St. Louis County has recently stayed the election pending the disposition of this appeal. In that case, Appellee Millsap, the Chairman of the Freeholders, stated in a memorandum that the final total cost of the Board's activities had been $628,173.00 and the anticipated cost of the election would be $666,000.00. *State ex. rel. City of Ladue v. St. Louis City/County Board of Freeholders,* 589490 Circuit Court of St. Louis County, Missouri. *cf. J.A. 27 and 28, para. 44 and 45.*

Pursuant to the charge given to the Board by the enabling petitions and under the broad fifth provision of Section 30(a) of the Missouri Constitution, the "Freeholder Plan," as it is publicly known, calls for a substantial reorganization of government in St. Louis County. The plan seeks to change the number and powers of the various municipal entities and to effect a significant overhaul of the present scheme for the imposition and distribution of local taxes. The Freeholder Plan contains the following elements;

— reduction of property taxes throughout St. Louis County;

— imposition of a new 1 percent tax on individual gross earnings in the County;

— levying a 6 percent tax on non-residential utility usage in the County;

— consolidation of all 90 existing cities of the County and its unincorporated area into 37 restructured cities with new forms of government and boundaries (this consolidation does not affect the City of St. Louis);

— reorganization of the system for delivery of fire and emergency medical services throughout the County including the reduction of 43 existing fire districts and departments into 4 new districts;

— modification of the formula for distribution of sales tax revenues among local governments in the County;

— reorganization of St. Louis County government functions and financing; and

— establishment of, and new taxation to support, a City-County economic development district and a metropolitan council to evaluate area problems and propose solutions to the citizens.

Plan for Governmental Reorganization in St. Louis and St. Louis County, September 13, 1988. (Lodged with the clerk for the court's reference.)

The History of This Litigation

Litigation between these parties commenced shortly after the Board of Freeholders was convened. Appellants, acting individually and on behalf of a class consisting of all registered voters of Missouri not owning real property, filed a complaint under Title 42 U.S.C. Section 1983 in the United States District Court for the Western District of Missouri. Appellants alleged that Article VI, Section 30 of the Missouri Constitution violated

the rights guaranteed to the plaintiff class by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in that service on a Board of Freeholders is restricted to owners of real property. *S.J. A-25.*

After all the parties who are Appellees in this Court were joined as defendants, the district court issued a temporary restraining order to enjoin further enforcement of Section 30 pending a hearing on Appellants' claim for preliminary and permanent injunctive and declaratory relief. *S.J. A-28.* On Appellees' interlocutory appeal, the United States Court of Appeals for the Eighth Circuit initially stayed the restraining order but later modified and reinstated it. *S.J. A-30, 31.*

Just one day prior to trial on the merits of Appellants' complaint in the district court, Appellees filed a petition for declaratory judgment in the state Circuit Court of St. Louis County, naming all plaintiffs in the federal district court as parties defendant. That case, in which Appellees sought a declaration that Section 30 is constitutional, is the subject of the present appeal.

Prior to any resolution of the state case, the district court declared that Section 30 violated the Fourteenth Amendment, both facially and as applied, and permanently enjoined its enforcement. *S.J. A-34, 59.* On appeal of that judgment, a divided panel of the Eighth Circuit concluded on April 26, 1988 that the district court should have abstained and ordered the parties to proceed to trial in the state court. *S.J. A-61.* The court of appeals stated that a full opinion would be issued later. To date, no opinion has been issued.

Thereafter, Appellants filed a counterclaim in the state court again alleging that Section 30 violated the equal protection rights of persons not owning real property and seeking declaratory and injunctive relief under Title 42 U.S.C. Section 1983. The parties refiled their stipulation of facts from the federal suit and each side filed cross motions for summary judgment. The

trial court sustained Appellees' motion and denied relief on Appellants' counterclaim, concluding that Section 30 did not require real property ownership as a condition of eligibility for service on the Board of Freeholders. *S.J. A-9.*

On appeal, the Supreme Court of Missouri ruled that appointment to the Board of Freeholders under Section 30 "was restricted to owners of real property." *S.J. A-7.* However, the court affirmed the judgment against Appellants because it concluded that the Board of Freeholders did not exercise any "general governmental powers" and, therefore, the Equal Protection Clause of the Fourteenth Amendment had "no relevancy." *S.J. A-7.* It is that judgment which Appellants now appeal to this Court.

Recently, the parties have been twice directed by the Eighth Circuit to submit supplemental briefs on the effect of the ruling by the Supreme Court of Missouri on the still pending appeal from the judgment of the United States District Court for the Western District of Missouri. The first set of briefs was submitted December 19, 1988 and the second set by February 1, 1989, as directed. The Eighth Circuit has taken no further action to date.

SUMMARY OF THE ARGUMENT

I. The Equal Protection Clause of the Fourteenth Amendment prohibits a state from arbitrarily treating one class of people differently from another, and this proscription is applicable to both benefits granted and liabilities imposed by state law. *U.S. Const., Amend. XIV; Sherbert v. Verner,* 374 U.S. 398 (1963). One manifestation of the equal protection guarantee is the federal constitutional right to be eligible for public service without the burden of invidiously discriminatory disqualifications. *Turner v. Fouche,* 396 U.S. 346 (1970); *Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159 (1977).

Article VI, Section 30 of the Constitution of the State of Missouri establishes a system for a tax supported board of free-

holders (property owners) to formulate and adopt a plan for local governmental reorganization and submit that plan to the voters of the City of St. Louis and St. Louis County for adoption. Upon adoption, the plan becomes the "organic law" of the area and supersedes all conflicting state statutes and local ordinances. *Mo. Const., Art. VI, § 30(b), A-3.*

A freeholder board established under Section 30 is the only public or private process in the State of Missouri by which a local electorate may abrogate state statutes and adopt its own constitution. *Mo. Const., Art. VI, § 30(b), A-3; State ex inf. Dalton v. Metropolitan St. Louis Sewer District,* 275 S.W.2d 225 (Mo.banc 1955).

Ownership of real property is required for public service under Section 30 and a property qualification was actually applied in creation of the present Board of Freeholders. *Mo. Const., Art. VI, § 30(a), A-1; Millsap v. Quinn,* 757 S.W.2d 591, 595, *S.J., A-7; Stipulation of Fact ¶15, 17, 19, 20, 21, J.A. 20, 21, 22, 30.*

Missouri has not identified any rational relationship which might exist between ownership of real property and service on a public body exercising the exclusive authority to draft and submit a plan touching virtually every aspect of local public affairs. *Millsap v. Quinn,* 757 S.W.2d 591 (Mo.banc 1988); *S.J., A-1.* Property ownership bears no rational relationship to commitment to community affairs or ability to discharge public responsibilities. *Turner v. Fouche,* 396 U.S. 346 (1970). The purpose and authority of a board of freeholders is not directly related to ownership of property nor does a freeholder board have a disproportionate effect on land owners. *Cf. Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973).

Property ownership is not rationally related to the powers and duties granted to a board of freeholders under Article VI, Section 30 of the Missouri Constitution. That provision, therefore, violates the equal protection rights of non-property owners by barring them from being eligible to serve on such a board.

II. Missouri's property ownership requirement also infringes on the rights of the appellant class as voters. This economic limitation restricts access to the ballot by affording only property owners the opportunity to present to the electorate their perspective on public issues of general significance. *Bullock v. Carter,* 405 U.S. 134 (1972).

A property limitation has a direct and substantial impact on voters by artificially limiting the array of proposals presented to the electorate. This impact falls most heavily on a readily identifiable segment of voters: the appellant class of non-property owners who are registered to vote. *Bullock, supra; Lubin v. Panish,* 415 U.S. 709 (1974).

Limitations on access to the ballot which infringe on the right to vote are subjected to a heightened level of Fourteenth Amendment scrutiny. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Bullock, supra; Lubin, supra.* Missouri has not identified any legitimate objective which the property restriction of Article VI, Section 30 is reasonably necessary to advance. *Millsap v. Quinn,* 757 S.W.2d 591.

The requirement that only owners of real estate may serve on a board of freeholders infringes on the rights of voters and is not reasonably necessary. Accordingly, Section 30 violates the Equal Protection Clause of the Fourteenth Amendment and the rights of the appellant class.

ARGUMENT

I

The Freeholder Requirement Of Article VI, Section 30 Of The Missouri Constitution Violates The Appellants' Right To Equal Protection Of The Laws Because It Conditions Eligibility For Public Service On The Invidiously Discriminatory Criterion Of Real Property Ownership.

The rights of the appellant class which were abridged in this instance are of significant and protectible constitutional dimensions. There is a basic right not to have a state deal with one class of citizen differently from another based on the status of property ownership. *U.S. Const., Amend. XIV; Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668 (1966). It makes no constitutional difference whether the classification is applied in granting a benefit or protecting a right. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Shapiro v. Thompson,* 394 U.S. 618, 627, *n.*6 (1969). The right to be eligible for public service without invidiously discriminatory disqualification is guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Turner v. Fouche,* 396 U.S. 346, 362-363 (1970). The issue in this case is whether the State of Missouri can extend to property owners the opportunity to serve on a tax supported public body exercising important public authority while arbitrarily denying that opportunity to non-property owners.

A. The appellant class has a federal constitutional right to be eligible for public service without an invidiously discriminatory disqualification based on property ownership.

The definitive statement of the right of each citizen to be eligible for public service without invidious discrimination was expressed by this Court in *Turner v. Fouche,* 396 U.S. 346 (1970). Striking down a freeholder requirement for membership on an appointed school board, the Court held:

> . . . the appellants and the members of their class [non-freeholders] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

Turner v. Fouche, 396 U.S. 346, 362 (1970).

In 1977, based on *Turner*, the Court summarily reversed a Louisiana decision upholding a state statute requiring ownership of real or personal property for appointment to an airport commission. *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159 (1977).

This Court has recognized the critical importance of not allowing restrictions based on property or economic circumstances to interfere with eligibility for public service. *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974).

These decisions reflect the essence of the Equal Protection Clause: states cannot arbitrarily classify residents and treat the classes differently. When the State of Missouri and the appointing authorities relied on the arbitrary status of property ownership as the criterion for determining which citizens would be allowed the opportunity for public service under Article VI, Section 30 of the Missouri Constitution, appellants' Fourteenth Amendment rights were violated.

B. The ownership of real property bears no rational relationship to the purposes of Article VI, Section 30 of the Missouri Constitution.

Discrimination in public affairs based on property is "traditionally disfavored." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966). The obvious reason is because "it seems impossible to discern *any* interest the qualification can serve." *Turner v. Fouche*, at 363 (emphasis added).

In *Turner*, the Court dealt with a freeholder requirement for service on a county school board. The State of Georgia claimed that those residents with a serious attachment to the community and its educational system could, as in this case, acquire a single square inch of real estate in order to satisfy the requirement. This Court held that the ownership of property is not related to the seriousness of those otherwise qualified for public service because a state "... may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold." *Turner* at 364.

In this case, the State of Missouri and its Supreme Court have not identified any relationship, rational or otherwise, which property ownership might have to the authority vested in a freeholder board under Section 30. Nor may the State now concoct some after-the-fact rationalization for its exclusionary requirement which Missouri's court has not adopted.[1] *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

The Missouri Supreme Court, in its opinion below, focused on cases concerning special purpose, land related districts for which this Court has approved real estate based voting schemes. The Missouri court did not seem to recognize that, in each case, this Court had extensively analyzed the circumstances pertaining to those districts and concluded that equal protection requirements were fulfilled because there was a legitimate purpose articulated by the state which was rationally related to the limitation in question.

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[1] The trial court stated that a property qualification "could enhance the work of a board of freeholders as one critical question is change of bounderies [sic] between the City and County." *Millsap v. Quinn, No. 572794, St. Louis County Circuit Court; S.J. A-19* (unpublished opinion). There was no attempt by the trial court to explain how the geography of contiguous municipal entities may be a matter of superior interest to property owners as opposed to other residents of those jurisdictions. That issue was not the basis for the trial court's ruling and the Missouri Supreme Court did not adopt, nor even refer to, the trial court's conclusion.

In *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973) and *Ball v. James*, 451 U.S. 355 (1981) this Court found that each water or irrigation district involved had (1) narrow, limited purpose directly related to property ownership; *and* (2) a disproportionate effect on land owners. These cases applied the two-prong analysis which was suggested in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970). In *Hadley* the Court acknowledged that there could be some instances involving "certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups" that strict equal protection analysis might not be required. *397 U.S. at 56.*

In the three water district cases there was a clearly articulated legitimate objective identified by the states involved. The Court concluded there was a sufficient relationship between property ownership and the districts' affairs to satisfy Fourteenth Amendment requirements. The cases presented an obvious and critical disproportionate relationship between the district in question and land ownership:

> In short, there is no way that the economic burdens of district operations can fall on residents *qua* residents, and the operations of the districts primarily affect the land within their boundaries.

Salyer at 729. *See also Associated Enterprises* at 745 and *Ball* at 367, *n* 13. The direct relationship between the *status* of property ownership and the limited purposes of the water districts satisfied the exceptional circumstances envisioned in *Hadley*.

The circumstances of this case are far different. A freeholder board is a tax supported public body. It has exclusive authority to draft and submit a proposal to direct the operations of local governments providing extensive traditional municipal services to a million and a half people, regardless of their property

ownership status. There is a vast difference between the board of directors of a water storage district encompassing 193,000 acres of agricultural land (85% of which was farmed by four corporations), inhabited by 59 adults and 18 children (*Salyer Land Co.* at 723), and the unique role a freeholder board plays in shaping governments throughout a major urban center.

The Missouri Supreme Court missed the mark of equal protection analysis by focusing on the suspect conclusion that a freeholder board does not exercise general governmental powers.[2] The board's powers are extensive and, when exercised, result in broad impact throughout the St. Louis metropolitan area. A board of freeholders is a public body created by the state constitution and appointed by the executive branch of state and local government. It is funded by general tax revenues and charged with proposing a plan for general governmental reorganization for submission to a public vote. Its public duties and the breadth of its agenda demand the widest array of community participation rather than the exclusion of 26% and 55% of the residents affected.[1]

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[2] This is the same position the Missouri Supreme Court adopted in *Hadley v. Junior College District of Metropolitan Kansas City*, 432 S.W.2d 328 (Mo.banc 1968). There the court also postulated that the entity in question, a college district, was "not a unit of local government having general governmental powers" and that the guarantee of the Equal Protection Clause "does not properly apply." *Hadley*, 432 S.W.2d at 334. This Court reversed the Missouri decision, pointing out that the district performed "important governmental functions" having "sufficient impact throughout the district" to require strict application of the Fourteenth Amendment's one man, one vote requirements. *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 54 (1970).

[1] Figures based on owner occupied/renter occupied data for St. Louis County and City of St. Louis, respectively, and contained in Bureau of Census Report Table H-1, pp. H-3 and H-6 (1980).

A freeholder board under Section 30 is an exclusive and, indeed, powerful governmental body which has no parallel in Missouri law. The board is authorized to deal with virtually every aspect of local affairs. In addition to the right to draft plans to adjust the relationship between the City of St. Louis and St. Louis County and to create area-wide service districts, the board of freeholders is empowered to "formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county." *Mo. Const., Art. VI., § 30(a), A-1.*

By way of example, consider the range of issues reflected in the plan agreed to by the present Board:

- reduction of property taxes throughout St. Louis County;
- imposition of a new 1% earnings tax in the County;
- dissolution of ninety existing cities and establishment of thirty-seven new municipalities;
- setting new property and utility tax rates for every city in the County;
- elimination of all existing municipal fire departments and fire districts and creation of four new fire and emergency medical service districts in the County;
- redistribution of sales taxes among County cities;
- restriction of land planning authority in cities and vesting of planning authority and zoning oversight in the County government;
- creation of new metropolitan and economic development commissions with new tax revenues for their support.[4]

[4] The plan elements as agreed to at the time of trial are set out in the Joint Appendix at *J.A. 55.* In addition, the final plan adopted by the Board of Freeholders has been lodged with the Clerk for the convenience of the Court.

Moreover, a freeholder board is the only public or private body in the State that is able to do the things authorized by Section 30. The board members' exclusive power is derived from two unique aspects of the grants of authority contained in that section of the Missouri Constitution: a plan prepared by the freeholders *supersedes* state statutes, and the plan may be submitted at a *local* election.

The Missouri Supreme Court has described the authority of a freeholder board under Section 30 in the following language:

> The authority to prepare such a district plan is a broad grant of legislative power to the freeholders (with confirmation by the voters) similar to the grants in Sections 18, 19 and 20, Article VI, giving certain counties and cities the right to frame, adopt and amend their own charters. It is even greater because their plan supersedes conflicting laws.
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> *State ex inf. Dalton v. Metropolitan St. Louis Sewer District,* 275 S.W.2d 225, 228 (Mo.banc 1955).

Section 30's distinctive language provides that, if adopted by the requisite majority, the freeholders' plan "shall become the organic law of the territory therein defined and shall supersede all laws, charter provisions and ordinances inconsistent therewith." *Mo. Const., Art. VI, § 30(b); A-3.* Local government charter commissions,[5] local governments themselves,[6] and

[5] Compare the language describing the right of a city/county freeholder board to draft a plan superseding conflicting statutes to limitations imposed on charter counties, charter cities and the City of St. Louis under *Mo. Const., Art. VI, §§ 18(b), 19(a) and 32(b).*

[6] C.F. *City of Kirkwood v. City of Sunset Hills,* 589 S.W.2d 31 (Mo.App. 1979) and *McCarty v. City of Kansas City,* 671 S.W.2d 790, 793 (Mo.App. 1984). Any conflict between state statutes and city ordinances must be resolved in favor of the state law.

the initiative process[7] have no such latitude, for they cannot go beyond limits imposed by state statutes. Article VI, Section 30 is the only provision in Missouri law which allows such local autonomy.

The freeholders, by virtue of their public office, can do what no other governmental body or citizens can do. The freeholders can write a local constitution.

The exclusive right of freeholder boards under Section 30 to submit their plan to the local electorate is partcularly meaningful. Any other public or private body wishing to formulate and submit an initiative proposal which is at variance with statutory restrictions in any respect must do so by a statewide process. *Baum v. City of St. Louis,* 123 S.W.2d 48, 50 (Mo. 1938). If feasible, at all, initiative would be substantially more burdensome[8] and expensive[9] than invoking the freeholder process.

A freeholder board is created in response to petitions signed by fewer registered voters than required for an initiative petition. *Mo. Const., Art. VI, § 30(a); A-1.* Freeholders may formulate, adopt and submit a proposal embracing a variety of separate subjects in a single comprehensive plan. *Mo. Const., Art. VI, §§ 30(a) and (b), A-1, 3; Mo. Atty. Gen. Op. Letter No. 412-87 (Hoblitzelle).* The election to consider the plan is

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[7] A local initiative can only propose that which the local legislature would be authorized to adopt. *Baum v. City of St. Louis,* 123 S.W.2d 48, 50 (Mo. 1938).

[8] Five percent of the registered voters in two-thirds of the state congressional districts must submit a petition and it is not adopted unless approved by a state-wide majority. No initiative petition may contain more than one subject. *Mo. Const., Art. III, §§ 50, 51.*

[9] Sec. 115.646 RSMo., Supp. 1988, prohibits the expenditure of public funds to support ballot measures.

held only in the City and County. *Mo. Const., Art. VI, § 30(b), A-3.* Any expenses associated with the freeholder board's operations are paid by tax revenues of the City and County. *Id.*

Accordingly, a board operating under Section 30 can avoid the expense, uncertainty and complexities associated with an effort to educate and persuade a state-wide electorate. Only freeholders can package a comprehensive assortment of specific proposals in a single unified plan. Only freeholders can deal with the entire process on a strictly local basis. And, perhaps most importantly, only freeholders can expend tax revenues levied upon all area taxpayers (whether or not those taxpayers own real property) to pay for the expertise and resources to prepare and present their plan. *Stipulation of Fact ¶25, 28, 29 and 44, J.A. 24, 25, 27; Mo. Const., Art. VI, §§ 30(a) and (b), A-1.*

The range of issues within a freeholder board's jurisdiction under Section 30 is unbridled. There can certainly be no valid assumption that one who acquires a freehold interest in real estate thereby becomes specially versed in the myriad of issues encompassed within the authority to adopt a plan for the complete system of governance of a diverse metropolitan area. *Cf. Plan for Governmental Reorganization in St. Louis & St. Louis County, September 13, 1988.*

The freeholder requirement of Section 30 disqualifies those who cannot rationally be assumed unfit for service. *Turner v. Fouche,* 396 U.S. 346, 364 (1970). There is no aspect of property ownership which is reasonably related to superior intelligence, enhanced knowledge of community concerns or deeper commitment to community betterment. *Cf. Turner* at 364 and *Woodward v. City of Deerfield Beach,* 538 F.2d 1081, 1083 (5th Cir. 1976).

Conversely, reliance on the status of property ownership as a criterion to participate in this public body permits service by landowners without regard to rational standards consistent with the purpose and authority of a board of freeholders.

The Missouri Constitution does not require that a freeholder's property be located within the City or County, nor even within the State. It does not require any type or amount of real estate. It does not specify any length of time a freeholder must have owned property, nor even that the property be subject to taxation. *Cf. Chappelle v. Greater Baton Rouge Airport District,* 431 U.S. 159 (1977).

Because of the freeholder requirement, Father Reinert, a distinguished educator and community leader, was disqualified from service on this Board, *Stipulation of Fact ¶19, 20, J.A. 22.* Likewise, appellants Quinn, a state legislator, and Kampsen, an attorney, together with thousands of other dedicated, capable residents, were disqualified only because of their failure to own property. In comparison, someone who just moved to the St. Louis area and has registered to vote is presumed to be qualified to propose a plan for the reorganization of the entire system of local government on the day he purchases a home. Property ownership status at the time of appointment does not have any relationship to familiarity with area concerns.

C. The appellant class was deprived of its constitutional right to be eligible for public service by Article VI, Section 30 of the Missouri Constitution and the actions of the appointing authorities in this case.

The State urged both the state and federal courts to accept the premise that property ownership is not a requirement under Section 30. The Missouri Supreme Court concluded otherwise. It held that ". . . membership on the Board of Freeholders was *restricted* to owners of real property." *Millsap v. Quinn,* 757 S.W.2d 591, 595 (Mo.banc 1988); *S.J., A-7* (emphasis added). Had the Missouri Supreme Court been of the opinion that there was no property requirement in Section 30, it would not have found it necessary to address any constitutional issue. Missouri has long followed the same principle as this Court: constitutional questions are to be resolved *only* when essential to dispose

of the case presented. *State ex rel. Williams v. Marsh,* 626 S.W.2d 223 (Mo.banc 1982); *State v. Rector,* 40 S.W.2d 639 (Mo. 1931); *United States v. Clark,* 445 U.S. 23 (1980).

The Missouri Supreme Court was aware that the federal district court's judgment declaring Section 30 unconstitutional, both on its face and as applied (*S.J. A-58*), had been reversed by the Eighth Circuit Court of Appeals on abstention grounds. *S.J. A-61.* The evident purpose of abstention was to afford the Missouri Supreme Court an opportunity to resolve the issues on the basis of state law. The state court, however, dealt with the case exclusively on the basis of federal law.[10] *Millsap v. Quinn,* 757 S.W.2d 591, 594-595 (Mo.banc 1988); *S.J. A-5 -A-7.*

In addition to the facial unconstitutionality of Section 30, the stipulated evidence established an unconstitutional application of a property requirement in the appointment of the present Board of Freeholders. The stipulated evidence established:

(1) The petitions filed by area residents to authorize appointment of this Freeholder Board sought "to establish a board of St. Louis area property owners (freeholders) ..." *Stipulation of Fact ¶15, J.A.20; Exhibit No. 1, J.A. 30.*

(2) The Mayor of the City of St. Louis intended to appoint Rev. Paul C. Reinert, president emeritus of St. Louis University and a distinguished resident of the St. Louis community, as a

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[10] The State has asserted that there are adequate and independent state grounds for the decision. The Missouri Supreme Court did not attempt any construction of the freeholder requirement of Section 30 which would resolve the dispute between the parties on the basis of state law. The Missouri court expressed only its view of federal law and the Equal Protection Clause. Even if any ambiguity might be alleged to be present in the Missouri court's opinion, there still is clearly no "plain statement" of reliance on any state ground which would interfere with this Court addressing the federal claims asserted by the appellant class. *Michigan v. Long,* 463 U.S. 1032, 1042 and n. 7 (1983); *Harris v. Reed,* No. 87-5677, 57 U.S.L.W. 4224, 4226 (U.S. Feb. 22, 1989).

member of the Board on behalf of the City of St. Louis. When the City's attorney advised that ownership of real property was required for service on a freeholder board, Father Reinert was dropped from the list of appointees because, being a Jesuit priest, he owned no real property. *Stipulation of Fact ¶19, 20, J.A.22.*

(3) The attorney for St. Louis County also rendered the opinion that ownership of real property was a requirement for service on the Freeholder Board under Section 30. As a result, all appointees of the St. Louis County Executive were checked against county records to verify that each owned real estate before the names were submitted to the County Council for approval. *Stipulation of Fact ¶17, J.A. 21.*

(4) Governor Ashcroft, a former Attorney General of Missouri, stipulated that having an ownership interest in real property was one of the criteria he required of any person he considered for appointment. *Stipulation of Fact ¶21, J.A.22.*

There is no question that there was an actual application of a property requirement in the current instance. Appointees from each appointing jurisdiction had to have the status of real property owners in order to be eligible to serve on this Board.

These actions by the appointing authorities also comprise state action for purposes of the Fourteenth Amendment. A state enactment which might be valid on its face (though this one is not) is unconstitutional if applied in such a way as to violate Fourteenth Amendment rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886).

Every member of the appellant class was ineligible to serve on this Board of Freeholders, not only because of the plain language of Section 30, but also because of the actions of the appellee appointing authorities in the discharge of their official duties. The appellants have been deprived of significant constitutional rights and the opportunity for public service due to a requirement which bears no rational relationship to the duties

and powers of the board. The State of Missouri extended to one class of its residents an opportunity which it denied to the appellants in violation of the Equal Protection Clause of the Fourteenth Amendment. Appellants are, and have been, entitled to the relief they seek.

II

Article VI, Section 30 Of The Missouri Constitution Violates The Equal Protection Clause Of The Fourteenth Amendment Because It Directly And Substantially Infringes On The Right To Vote.

The Missouri Supreme Court's decision discounts the significance of service on the board because a freeholder plan must be approved by the voters. It is the need for a public vote, however, which subjects the freeholder process to additional Fourteenth Amendment protections. The appellant class consists of registered voters who do not own real property. *J.A. 3.* The rights of this class, as voters, are directly and substantially infringed by Section 30's discrimination against non-freeholders.

This Court has long held that the free exercise of the franchise is a fundamental constitutional right protected by the Fourteenth Amendment. *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969). An alleged infringement of that right must, therefore, be "carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

> No State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall ... deny to any person ... the equal protection of the laws.'

Williams v. Rhodes, 393 U.S. 23, 29 (1968). *See also Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

Infringement of voter rights includes circumstances which debase or dilute the weight of a citizen's participation. *Reynolds v. Sims,* at 555. As a result, strict scrutiny is required to ensure that every voter's participation is of equivalent effect. *Reynolds v. Sims, supra* (state legislatures); *Avery v. Midland County,* 390 U.S. 474 (1968) (local governments); *Hadley v. Junior College District,* 397 U.S. 50 (1970) (special-purpose entities).

A. Property qualifications which limit access to the ballot and infringe on the rights of voters violate the Fourteenth Amendment if they are not reasonably necessary to the achievement of a valid state objective.

In elections of general public importance, property qualifications infringing on voters' rights are "traditionally disfavored" and have consistently been held a violation of the Equal Protection Clause. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668, 670 (1966); *Kramer v. Union Free School District,* 395 U.S. 621, 633 (1969); *Cipriano v. City of Houma,* 395 U.S. 701, 706 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204, 213 (1970); *Bullock v. Carter,* 405 U.S. 134, 149 (1972); *Lubin v. Panish,* 415 U.S. 709, 718 (1974).

The right of ballot access "is entitled to protection and is intertwined with the right of voters" under the Equal Protection Clause. *Lubin* at 716. A heightened standard of constitutional review has been required in cases of candidates seeking access to the ballot because economic restrictions on candidacy have a concomitant effect on the fundamental rights of voters. *Bullock v. Carter,* 405 U.S. 134, 144 (1972); *Lubin v. Panish,* 415 U.S. 709, 716 (1974).

A state regulation affecting access to the ballot which limits the array of choices available to the voter must be closely scrutinized and found "reasonably necessary to the accomplishment of a legitimate state objective in order to pass constitutional muster." *Bullock,* at 144. *See also Lubin,* at 718, and *Williams v. Rhodes,* 393 U.S. 23, 31 (1968).

B. The freeholder requirement of Article VI, Section 30 has a direct and substantial impact on voters' rights.

Bullock v. Carter, 405 U.S. 134 (1972) and *Lubin v. Panish,* 415 U.S. 709 (1974) are cases concerning the access of candidates to primary election ballots. In each case a state regulation (the payment of filing fees) had a likelihood of denying an identifiable segment of the population access to the ballot. Because the candidates who may be "favorites" of a similarly situated class of voters were most likely to suffer the disqualification, the effect on voters' rights was held to be "neither remote nor incidental." *Bullock,* at 144.

In *Lubin v. Panish, supra,* the Court held that the right to vote is "heavily burdened" if a voter is presented only the option of voting for "one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." *Lubin,* at 716. Voters have a right to an array of candidates which is not artificially limited:

> It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean that every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.

Id. at 716.

The constitutional principles applicable to questions of *who* has access to the ballot must be equally applicable when, as here, the issue is *what* will be on the ballot. A freeholder board has the exclusive right to determine which of multiple public issues and policy perspectives clamoring for attention will be on the ballot for consideration. See discussion in Argument I at 23-24, *supra.* As in *Lubin,* those who are precluded from participating in the freeholders' process do not have an alternative

system available to them to submit a similar proposal to the same electorate. *Lubin*, at 718. See discussion in Argument I at 24-25, *supra*. If the voters reject a specific freeholder plan, the public issues which were the subject of the proposed reforms can only be addressed by another freeholder board.

The rights of voters are heavily burdened in the case of Section 30's property qualification because there is an identifiable segment of society, non-property owners, who are not allowed equal access to the presentation of their policy preferences in the election. As in *Lubin*, eligibility for service on a freeholder board would not guarantee that the perspective of non-property owners will ultimately be reflected in the plan before the voters. The property qualification does mean, however, that non-freeholders are barred from participating in the only process for submission of a plan and that the likelihood for a plan reflecting their perspectives on public issues is diminished.

A freeholder board has authority to affect every aspect of public affairs in the St. Louis area, as discussed in the preceding Argument at 22-24, *supra*. The language used by the Fourth Circuit Court of Appeals in ruling unconstitutional a freeholder requirement for voting on municipal annexations seems as though it was written with a St. Louis freeholder board in mind:

> A change in the entire structure of local government is a matter of general interest. Annexation will affect municipal services that every citizen receives - whether or not he is a freeholder. The district court found that this annexation "not only involves changes in taxation, police, and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself." Therefore, a property-based classification of voters is of no less constitutional significance in an annexation referendum than when the question is the issuance of municipal bonds or the details of operating a school system.

Hayward v. Clay, 573 F.2d 187, 190 (4th Cir. 1978).

The class of citizen upon whom the burden of the freeholder requirement most readily falls is the less affluent. It is this same class which may be most dependent upon the services provided by the governments a freeholder plan seeks to reorganize. In declaring economic requirements on ballot access unconstitutional, this Court pointed out that such limitations create an inequality which ". . . gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Bullock v. Carter*, 405 U.S. 134, 144 (1972). Missouri's freeholder qualification under Section 30 affords that same advantage to those having freeholder status while those less fortunate are denied a reasonably equivalent opportunity.

Because of this direct and substantial impact on voters, a heightened standard of constitutional scrutiny is required in this case.

C. Because a freeholder qualification is not reasonably necessary to achieve any legitimate state objective it violates the Equal Protection Clause of the Fourteenth Amendment.

As discussed in Argument I, 19-26, *supra*, Missouri has not identified any rational relationship between service on a freeholder board and property ownership. Nor did the Missouri Supreme Court articulate any legitimate state objective allegedly advanced by its freeholder requirement. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

In *Bullock v. Carter*, the State of Texas had an economic purpose in requiring primary election candidates to defray the cost of those elections, as well as an objective of reasonably regulating the ballot. *Bullock*, at 144-145. In *Lubin v. Panish*, this court acknowledged the legitimacy of California's objective of avoiding "laundry list" primary election ballots cluttered with non-serious candidates. *Lubin*, at 715. Yet these recogniz-

ed and legitimate objectives had to yield to the fundamental rights of the voters because the regulations involved were not reasonably necessary to achieve the intended purposes.

The only justification advanced by the Missouri Supreme Court for permitting a property qualification is the assertion that a freeholder board does not exercise "general governmental powers." In this regard, the *Bullock* and *Lubin* cases are particularly relevant. Both cases concerned candidates seeking to present themselves in primary elections. In each case the Equal Protection Clause was applied to protect the candidate's right to seek office. Yet candidates in primary elections exercise no governmental authority whatsoever, let alone general governmental powers. To the contrary, primary election candidates, even if successful, merely attain the opportunity to present themselves to the electorate once again in a general election. Missouri's current deprecation of a freeholder board's authority can certainly not be said to provide a reasonable necessity for maintaining this discriminatory classification.

The freeholder process may be likened to a primary election. It is the freeholders who determine what issues will finally be presented to the voters, just as the primary election determines who will appear on the general election ballot. Yet there is no reasonable necessity for state regulations which discriminate against candidates seeking to participate in a primary election's weeding-out process. In this case, there is no necessity for Missouri to exclude one class of its citizens from an equal opportunity to determine the composition of the freeholders' election ballot. This is especially true when the basis for the inequality is itself arbitrary and irrational:

> Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured . . . by means more finely tailored to the desired goal.

Turner v. Fouche, 396 U.S. 346, 364 (1970).

Were it not for the constraints of the freeholder requirement, Mayor Schoemehl would have been able to appoint the members of the Board he originally chose as being best able to represent the City of St. Louis. It would not have been illegal for the appointing authorities to select board members from all segments of the population. Whether or not any specific proposal would actually have reached the ballot had this Board of Freeholders been more representative of the community is not, of course, the issue in this case. What is at issue is a board which, for no stated reason and with no reasonable necessity, is forbidden by law from being representative.

CONCLUSION

The rights of the appellant class to equal protection of the laws are violated by the freeholder requirement in Article VI, Section 30 of the Missouri Constitution, both on its face and as applied in this instance.

The judgment of the Missouri Supreme Court should be reversed, and Article VI, Section 30 of the Missouri Constitution declared invalid as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

March 24, 1989

Respectfully Submitted,

Kevin M. O'Keefe*
*(Counsel of Record)
Charles W. Bobinette
Uthoff, Graeber, Bobinette & O'Keefe
906 Olive Street, Suite 300
St. Louis, Missouri 63101
(314) 621-9550

and

Jess W. Ullom
Mark D. Mittleman
Kavenev, Beach, Bond, Ullom & Burcke
222 South Central, Suite 900
St. Louis, Missouri 63105
(314) 863-8484
Attorneys for Appellants

ADDENDUM

ADDENDUM

Article VI, Constitution of 1945

Section 30(a). Powers conferred with respect to intergovernmental relations—procedure for selection of board of freeholders. The people of the city of St. Louis and the people of the county of St. Louis shall have power (1) to consolidate the territories and governments of the city and county into one political subdivision under the municipal government of the city of St. Louis; or, (2) to extend the territorial boundaries of the county so as to embrace the territory within the city and to reorganize and consolidate the county governments of the city and county, and adjust their relations as thus united, and thereafter the city may extend its limits in the manner provided by law for other cities; or, (3) to enlarge the present or future limits of the city by annexing thereto part of the territory of the county, and to confer upon the city exclusive jurisdiction of the territory so annexed to the city; or, (4) to establish a metropolitan district or districts for the functional administration of services common to the area included therein; or, (5) to formulate and adopt any other plan for the partial or complete government of all or any part of the city and the county. The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one an elector of some other county. Upon the filing with the officials in general charge of elections in the city of a petition proposing the exercise of the powers hereby granted, signed by registered voters of the city in such number as shall equal three percent of the total vote cast in the city at the last general election for governor, and the certification thereof by the election officials to the mayor, and to the governor, then, within ten days after the certification the mayor shall, with the approval of a majority of the board of aldermen, appoint the city's nine members of the board, not more than five of whom shall be members of or affiliated with

the same political party. Each member so appointed shall be given a certificate certifying his appointment signed by the mayor and attested by the seal of the city. Upon the filing with the officials in general charge of elections in the county of a similar petition signed by registered voters of the county, in such number as shall equal three percent of the total vote cast in the county at the last general election for governor, and the certification thereof by the county election officials to the county supervisor of the county and to the governor, within ten days after the certification, the county supervisor shall, with the approval of a majority of the county council, appoint the county's nine members of the board, not more than five of whom shall be members of or affiliated with the same political party. Each member so appointed shall be given a certificate of his appointment signed by the county supervisor and attested by the seal of the county.

Section 30(b). Appointment of member by governor—meetings of board—vacancies — compensation and reimbursement of members—preparation of plan—taxation of real estate affected—submission at special election—effect of adoption—certification and recordation—judicial notice. Upon certification of the filing of such similar petitions by the officials in general charge of elections of the city and the county, the governor shall apppoint one member of the board who shall be a resident of the state, but shall not reside in either the city or the county, who shall be given a certificate of his appointment signed by the governor and attested by the seal of the state. The freeholders of the city and county shall fix reasonable compensation and expenses for the freeholder appointed by the governor and the cost shall be paid equally by the city and county. The appointment of the board shall be completed within thirty days after the certification of the filing of the petition, and at ten o'clock on the second Monday after their appointment the members of the board shall meet in the chamber of the board of aldermen in the city hall of the city and shall proceed with the discharge of their duties, and shall meet at such other times and

places as shall be agreed upon. On the death, resignation or inability of any member of the board to serve, the appointing authority shall select the successor. The board shall prepare and propose a plan for the execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder. The members of the board shall receive no compensation for their services as members, but the necessary expenses of the board shall be paid one-half by the county and one-half by the city on vouchers signed by the chairman of the board. The plan shall be signed in duplicate by the board or a majority thereof, and one copy shall be returned to the officials having general charge of elections in the city, and the other to such officials in the county, within one year after the appointment of the board. Said election officials shall cause separate elections to be held in the city and county, on the day fixed by the freeholders, at which the plan shall be submitted to the qualified voters of the city and county separately. The elections shall not be less than ninety days after the filing of the plan with said officials, and not on or within seventy days of any state or county primary or general election day in the city or county. The plan shall provide for the assessment and taxation of real estate in accordance with the use to which it is being put at the time of the assessment, whether agricultural, industrial or other use, giving due regard to the other provisions of this constitution. If a majority of the qualified electors of the city voting thereon, and a majority of the qualified electors of the county voting thereon at the separate elections shall vote for the plan, then, at such time as shall be prescribed therein, the same shall become the organic law of the territory therein defined, and shall take the place of and supersede all laws, charter provisions and ordinances inconsistent therewith relating to said territory. If the plan be adopted, copies thereof, certified to by said election officials of the city and county, shall be deposited in the office of the secretary of state and recorded in the office of the recorder of deeds of the present county, and the courts of this state shall take judicial notice thereof.

APPELLEE'S

BRIEF

No. 88-1048

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR., et al.,
Appellants,

vs.

WAYNE L. MILLSAP, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF FOR APPELLEES

WILLIAM L. WEBSTER
Attorney General of Missouri
SIMON B. BUCKNER
(Counsel of Record)
Assistant Attorney General
3100 Broadway - Suite 609
Kansas City, Missouri 64111
(816) 531-4207
Attorneys for Appellees
State of Missouri and
Governor John D. Ashcroft

April 7, 1989

(Other Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

THOMAS W. WEHRLE
St. Louis County Counselor
ANDREW J. MINARDI
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105
Attorneys for Appellee County Executive Gene McNary

JAMES L. WILSON
St. Louis City Counselor
EUGENE P. FREEMAN
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
Attorneys for Appellee Mayor Vincent C. Schoemehl, Jr.

QUESTIONS PRESENTED

1. Given that the courts of the State of Missouri have determined that the Missouri Constitution does not discriminate between citizens based upon their ownership of real property, is there any reason for this Court to review an equal protection attack upon the face of the Missouri Constitution?

2. May this Court review the constituent parts of a state legislative process that affords each citizen the right to cast an undiluted vote for or against proposed legislation?

3. Does the named Appellants' inability either to identify a distinct and palpable injury or to trace a causal connection from the complained of conduct to the alleged injury, demonstrate their lack of standing to bring this litigation into federal court?

4. May this Court review the reasonableness of the actions of elected state executives who make discretionary appointments to a policy-proposing board that can effect no change without ratification of the entire affected electorate?

5. Would there be a rational basis for a state statute or the act of an elected official to limit appointments to a board that proposes—in the form of ballot questions—plans for the reorganization of metropolitan government, to persons who own real property?

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

On November 4, 1924, the people of the State of Missouri, by initiative petition, voted to create a legislative process whereby the people of St. Louis City and St. Louis County could reorganize governmental functions and boundaries within the metropolitan area. The procedure was inserted into the Missouri Constitution of 1875 at Article IX, § 26. The provision was readopted, without change, in the constitutional convention of 1944, which resulted in the document that, upon adoption by the electorate of the state on February 27, 1945, became the current Constitution of the State of Missouri. The constitutional provision, now numbered

Article VI, § 30(a) and § 30(b) [§ 30], was amended in ways not germane to this litigation on November 8, 1966.

The process of reorganizing the governments of metropolitan St. Louis begins when a sufficient number of registered voters in both the City and the County present petitions calling for the creation of a body called the "Board of Freeholders" [Board]. At such time, three executives appoint a total of nineteen persons to the Board. The Mayor of St. Louis City appoints nine members who are electors of the city. The County Executive of St. Louis County appoints nine members who are electors of the county. These eighteen appointments must be approved by the legislative bodies of the respective jurisdictions. The Governor of the State of Missouri appoints one member who is an elector of the State of Missouri from somewhere other than the city or county.

In 1987, citizens of St. Louis circulated petitions calling for the creation of a Board. The citizens collected a sufficient number of signatures and presented them to the appropriate election authorities. (J.A. 20 ¶ 15.) The election authorities certified the signatures to the Mayor, the County Executive and the Governor, who were called upon to make appointments to the Board.

Mayor Schoemehl prepared a list of nominees for submission to the St. Louis Board of Aldermen. (J.A. 21 ¶ 18.) In connection with the preparation of the list, he used several criteria, which criteria did not include the nominee's ownership of real property. (J.A. 21 ¶ 18.) After he had prepared his list, attorneys for the city advised him that each member of the Board had to own real property. (J.A. 21 ¶ 18.) Because one

of Mayor Schoemehl's selections did not own real property, his name was not presented to the City Board of Aldermen for approval. (J.A. 21 ¶ 19.)

County Executive McNary prepared a list of nominees for submission to the County Council. (J.A. 20-21 ¶ 16.) In connection with the preparation of the list, he used several criteria, which criteria did not include the nominee's ownership of real property. (J.A. 20-21 ¶ 16.) After he had prepared his list, attorneys for the county advised him that each member of the Board had to own real property. (J.A. 21 ¶ 17.) As it happened, each of the persons County Executive McNary had designated did own real property. (J.A. 21 ¶ 17.) McNary made no changes to the list he submitted to the county legislature for approval. (J.A. 21 ¶ 17.)

Governor Ashcroft stipulated that his appointment to the Board had to meet five criteria. (J.A. 22 ¶ 21.) One of his criteria was that the prospective member must own real property. (J.A. 22 ¶ 21.)

The present Board convened on September 28, 1987. (J.A. 20 ¶ 10.)

On November 10, 1987, Quinn et al. [Contestants], appellants herein, initiated federal litigation against the State of Missouri and its Attorney General in the United States District Court for the Western District of Missouri, alleging that § 30 violated rights guaranteed, among other things, by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Contestants alleged that § 30, both on its face and as applied, limited service on the Board of Freeholders to owners of real property.

The Attorney General appeared and moved to dismiss the action for failure to join indispensable parties,

want of standing and want of a justiciable controversy. The federal district court ordered the Contestants to dismiss the Attorney General and to add the appointing authorities. (S.J. A35.)[1] At the same time the court denied the motion to dismiss. The Contestants amended the litigation to include each member of the Board and each official responsible for appointing Board members [which, along with the State of Missouri, constitute the "Governments"]. (S.J. A35.) After declining the attorney general's offer to appoint them special relators in a quo warranto action,[2] the Contestants pursued a temporary restraining order in federal court. (S.J. A35.)

The federal district court issued a temporary restraining order to enjoin further action of the Board pending a hearing for injunctive and declaratory relief. (S.J. A35.) The United States Court of Appeals for the Eighth Circuit stayed and then modified the order. (S.J. A35.)

After Contestants forewent a second opportunity to be appointed special relators in a state quo warranto action, the Governments filed a declaratory judgment action in the Circuit Court for the County of St. Louis, naming the Contestants as parties defendant.[3] (J.A. 1.) The Con-

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1. In his subsequent opinion, the Honorable Scott O. Wright of the United States District Court for the Western District of Missouri terms it a voluntary dismissal.

2. The attorney general could not properly have brought the quo warranto action by himself. To raise Contestants' claim, he would have to argue against the constitutionality of § 30. As a matter of state law, he would then have to notify himself of the litigation and defend the charges he had filed.

3. After the Governments filed the state declaratory judgment action and before the Contestants answered, the federal district court conducted its hearing on the merits. It construed the Missouri Constitution to require members of the Board to own real property and, based upon its reading of *Turner v. Fouche*, 396

(Continued on following page)

testants filed a counterclaim, containing the same allegations and seeking the same relief as in the federal litigation. (J.A. 31.)

The parties submitted a stipulation of facts (J.A. 18) and cross-motions for summary judgment. (J.A. 8, 10, 11, 42.) The court found that § 30 did not require members of the Board to be owners of real property. The court sustained the Governments' motion and denied the Contestants' claim. (S.J. A9.)

The Missouri Supreme Court agreed that § 30 required the appointing authorities to appoint "electors" to the Board. (S.J. A1-A2.) The Court continued with a discussion of federal cases related to voter qualifications, a question the parties had not thought to raise, but perhaps addressing Contestants' claim of invalidity of the law as applied. The Court acknowledged that membership on the Board was restricted to persons who owned real property but, concluded that because the Board did not exercise general governmental powers, it was not necessary to analyze the applicability of the equal protection clause. (S.J. A7.)

Contestants have brought their attack upon the Missouri Constitution into this Court. (S.J. 1-23.) On February 21, 1989, this Court noted probable jurisdiction.

Since the time that this Court scheduled argument, the former chairman of the Board, acting *pro se*, has sought and obtained a state court order enjoining the vote on the plan until such time as this appeal has been resolved.

Footnote continued—

U.S. 346, 90 S.Ct. 532 (1970), held § 30 to be unconstitutional. The Eighth Circuit Court of Appeals reversed, finding that the district court should have abstained. The Eighth Circuit Court of Appeals has yet to articulate which of the several bases argued support its decision.

SUMMARY OF ARGUMENT

I. A. When assessing the compatibility of a state statute with the federal constitution, a federal court must take the statute as construed by the courts of the state. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73, 31 S.Ct. 337, 338 (1911). The Missouri courts have held that Article VI, § 30 of the Missouri Constitution does not distinguish between persons who do and who do not own real property. There being no classification of persons under Missouri law, this Court has no occasion to consider whether the hypothetical classification would constitute a deprivation of the equal protection of the laws.

B. The people of the State of Missouri voted to create a legislative process whereby the people of metropolitan St. Louis could reorganize local government. The process requires elected officials to appoint persons to a "Board of Freeholders" which proposes a plan to the electorate. An attack upon this legislative process is an attack upon the structure of state government, rather than upon a particular exercise of governmental power. As such, the attack upon the face of the statute does not present a justiciable controversy. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224 (1912). The dividing line between *Pacific States* and cases like *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962) is whether the exercise of state power is wholly a matter of state interest or whether it impinges upon a federally protected right. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960). The way in which the people of the state voted to allow the people of metropolitan St. Louis to put propositions on a ballot does not impinge upon a federally protected right.

II. A. The persons challenging the application of § 30 do not have standing to raise the claim in federal court. Appellants have neither alleged nor proved that there is a distinct and palpable injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620 (1978). Appellants have not shown a fairly traceable causal connection between the claimed injury and the challenged conduct. *Id.* The Appellants' position is analogous to that of the plaintiffs in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975).

B. The challenge to the statute as applied is based upon an alleged right to be considered for appointment to a particular advisory board. This challenge raises the claim considered, but not decided in *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323 (1974). The Governor, Mayor and County Executive who appointed persons to the Board have political reasons for their appointments. The criteria these persons used are politically, but not judicially, reviewable. *Marbury v. Madison*, 1 Cranch. (5 U.S.) 137 (1803).

III. A. People who do not own real property are not a suspect class. The "right" to be considered for appointment to an advisory board is not a fundamental right. In particular, the claim is unlike that present in the ballot access cases. Moreover, the claim does not touch upon the right to vote. As a result, any equal protection analysis is limited to an inquiry of a rational basis for the governmental classification. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383 (1987). Appellants' claim to participation in policy formulation above the level afforded to the whole electorate is not a federally protected right. *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969).

B. This Court has upheld durational residency requirements for public servants. *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976). Because homeowners face certain costs associated with moving, they tend to be less mobile than people who do not own homes. Hence, a homeowner requirement is analogous to a forward-looking durational residency requirement. A person who has to live with his decisions is likely to make his decisions carefully. Moreover, the process of purchasing a home in a metropolitan area provides an education in the costs and services of urban life. The people of the State of Missouri, in adopting § 30, could rationally have decided that a class of careful, knowledgeable people should be the ones to propose a plan of governmental reorganization to the electorate of metropolitan St. Louis.

ARGUMENT

The Constitution of the State of Missouri contains a provision giving the people of metropolitan St. Louis a way to reorganize local government. In connection with this legislative process, certain elected officials designate persons to serve on a board. The board has the power to consider plans for the reorganization of local government within a metropolitan area. Upon composing such a plan, the board proposes the plan to the affected electorate.

Contestants assert that they have a federal constitutional right to be considered for membership on this board. Contestants assert that the provision of the Missouri Constitution establishing the board and the officials who used § 30 to appoint members of the board deprived them of the equal protection of the laws for failing to consider them for membership on the board.

I. THIS COURT MAY NOT REVIEW CONTESTANTS' ATTACK OF § 30 ON ITS FACE.

Contestants first attack § 30 on its face. Their argument is that the Missouri Constitution requires every member of the Board to own real property. Because, the argument continues, this classification is devoid of any relationship to any state interest, it deprives them of the equal protection of the laws. Leaving aside the desirability of such a state of affairs, *see infra* Section III.B., the attack fails because the Missouri Constitution contains no such restriction. Because the necessary factual premise of Contestants' argument fails, there is nothing for this Court to review.

In urging this Court to set aside Missouri's interpretation of its own constitution, the Contestants face a second, equally fatal, impediment. Contestants' challenge attacks the structure of a state legislative process. This claim presents a nonjusticiable, political controversy.

Each of these reasons bars Contestants' action in derogation of the Missouri Supreme Court decision.

A. The Missouri Constitution Does Not Require Members of the Board to Own Real Property.

Before the Contestants may challenge the legitimacy of a state purpose and the reasonableness of a classification designed to effectuate that purpose, they must first show that the state has made a classification. Contestants assert that the state has created classes of citizens. The Governments maintain that it has not.

1. The Missouri courts found that the Missouri Constitution does not discriminate between citizens based upon their owning an interest in real property.

When this Court questions the substantiality of an issue brought before it, it does not hesitate to go back to the trial court decision to find out what the parties consider to be the important issues. *Klinger v. Missouri*, 13 Wall. (80 U.S.) 257 (1871) (using the trial court opinion to find a federal question). In this case, such an inquiry will dispose of the appeal. The Missouri courts have determined that the Missouri Constitution does not discriminate between persons who do and do not own real property for purposes of consideration for membership on the Board.

The trial court considered and rejected Contestants' suggestion that the Missouri Constitution limited membership on the Board to persons who owned real property. In the first paragraph of its analysis of the law, the trial court wrote that:

> This appears to be a case of first impression. Art. 6 Sec. 30(a) of the Missouri Constitution provides in part: "The power so given shall be exercised by the vote of the people of the city and county upon a plan prepared by a board of freeholders consisting of nineteen members, nine of whom shall be electors of the city and nine electors of the county and one elector of some other county." Thus the only qualification for members is that they be electors.

(S.J. at A17.) The Missouri Supreme Court construed the language in the same way. It wrote that:

> Following certification of the petitions, section 30 required both the mayor of St. Louis and the county supervisor of St. Louis County to appoint nine "electors" to the Board. In addition the Governor of Missouri was required to appoint one elector to the Board.

(S.J. at A1-A2.) The quoted language would appear to make it clear that the Missouri courts have determined that the only qualification for prospective members of the Board is that they be electors of specified cities or counties.

Contestants make much of the Missouri Supreme Court's recognition that "membership on the Board of Freeholders was restricted to owners of real property." *Millsap v. Quinn*, 757 S.W.2d 591, 595 (Mo. banc 1988). (S.J. at A1, A7.) The statement is a recognition of the stipulated fact that all persons who served on the Board did, in fact, own real property. The Court did not hold that the Missouri Constitution required any such restriction. To the contrary, as noted in the preceding paragraph, the Court specifically held that § 30 required the appointing officials to name "electors" rather than "owners of real property" to the Board.

The alleged ambiguity is easily resolved. The Missouri Supreme Court affirmed the decision of the trial court. The law in Missouri, as elsewhere, is that an appellate court will affirm a judgment if there is any theory, consistent with the facts of the case, to support that judgment. *E.g., Edgar v. Fitzpatrick*, 377 S.W.2d 314, 318 (Mo. 1964). If the appellate court disputes the rationale for the trial court decision, it makes that fact known in the body of its opinion, by citing to the rule. *See id.*

Given the frequency with which courts cite to the rule,[4] the absence of such a reference gives rise to an additional inference that the Missouri Supreme Court did not object to the trial court analysis.

In conclusion, the decision of the Missouri Supreme Court to "recognize" the *fact* that all members of the Board were "owners of real property" does not conflict in the least with the state trial court findings that, as a matter of *law*, the members of the Board were not required to be owners of real property. This conclusion of law was affirmed by the highest court of the state.

2. The analysis of the Missouri courts supports the conclusion that the Missouri Constitution does not distinguish between citizens on the basis of their ownership of real property.

Rather than discuss the rationale for the Missouri decisions, Contestants merely state their erroneous interpretation of the Missouri Supreme Court decision. A review of the logic of the state court decisions supports the conclusion that the Missouri Constitution does not require members of the Board to own an interest in real property. Contestants argued that because the name of the body contained the word "freeholder," the members

4. Rather than cite cases for the proposition that an appellate court may affirm a judgment on any theory consistent with the facts, the Missouri Supreme Court invited the readers of *Edgar v. Fitzpatrick*, 377 S.W.2d 314, 318 (Mo. 1964) to refer to the many pages of cases listed in West's Missouri Digest. The West key numbers for Appeal and Error 851-854 in the current edition of the digest cover 24 pages. *See* 2 Mo. Digest 2d 710-33 (West 1983). This count does not, of course, include all of the "harmless error" cases, which are digested at Appeal and Error 1025-74. 4 Mo. Digest 2d 74-438.

of the Board had to be freeholders. At common law, the argument continued, a "freeholder" was a person who owned a fee or life interest in real property. Thus, the argument concluded, the name of the Board unconstitutionally restricted its membership to persons who own real property.

a) The name of a Board does not affect the qualifications of its members.

The simple response to Contestants' complaint is that the name of the Board does not imply anything about the requirements for membership. In explaining its decision, the trial court suggested that the phrase "board of freeholders" was merely the name given to a group of people as, for example, a "board of commissioners." The term is ceremonial, rather than descriptive or restrictive. For example, the governing body of many Missouri counties is a "county court." Mo. Const. art. VI, § 7. The body's designation as a "court" places no restrictions on the persons eligible for service. Indeed, Harry S. Truman, who had neither a college degree nor a license to practice law, served for many years as Presiding Judge of the Jackson County Court. *See Bash v. Truman*, 75 S.W.2d 840 (1934).

The practice of affixing potentially misleading names to public bodies is not unique to Missouri. The legislature of Massachusetts is "the General Court." Mass. Const. pt. II, art. I, § 1. Moreover, the general governmental body for New Jersey counties is a "board of freeholders," N.J. Stat. Ann. § 40:20-1 (West Supp. 1987), though no litigant ever appears to have suggested that these people should own real property.

In Missouri, a "board of freeholders" names a group of electors convened to put forth a ballot proposition for St. Louis City and St. Louis County.

b) In the context of § 30, the word "freeholder" does not mean owner of real property.

Contestants have insisted, however, both that a 'freeholder" requirement should be read into the membership qualifications for serving on the Board and that such a restriction was unconstitutional because it limited membership on the Board to people who owned an interest in real property. (J.A. 42-43.) Assuming, arguendo, that one must be a "freeholder" to serve on the Board, the question becomes one of interpreting the meaning of the word "freeholder."

The meaning of the word "freeholder" is, of course, a question of state law. *See Turner v. Fouche*, 396 U.S. 346, 348 n.1, 90 S.Ct. 532, 534 n.1 (1970). The Governments acknowledge that the word "freeholder" *may* be, and frequently is, used to mean a person who owns an estate in real property in fee or for life. In this case, however, the trial court, the highest state court to pass explicitly on the issue, specifically refused to apply the *property law* definition of the word in this context. Instead, it adopted the reasoning of another state trial court that found that, when used in a *public law* context, the word "freeholder" was not a word of limitation. (S.J. A9, A18.) Thus, even if members of the Board had to be "freeholders", they did not have to own real property. The factual predicate of Contestants' argument fails. There being no classification, this court is not called upon to decide the hypothetical question advanced by the Contestants.

3. This Court has limited power when reviewing the judgments of state courts.

The Missouri courts have held that the Missouri Constitution requires only that prospective members of the Board be electors. They have refused to read the name of the Board as an additional requirement for membership. Finally, they have looked at the word "freeholder" in a variety of contexts and have decided that, as used here, the word does not mean "owner of real property." Contestants have asked this Court to rule differently.

Contestants' problem is that our federal system of government leaves the authority to construe state laws to state courts. When this Court reviews state court judgments, "it is necessary to inquire what construction has been put upon it by the highest court of the state, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73, 31 S.Ct. 337, 338 (1911).

Although Contestants may have wished for a different interpretation, the state courts have construed the language of the state constitution in such a way as to avoid creating the classification of which the Contestants complain. If the Missouri Constitution does not create separate classes of citizens, there is no need to consider whether there is a rational or other basis for establishing the imaginary classifications.

B. This Court May Not Review Litigation That Attacks the Form of State Government.

Although the Contestants have denominated their suit as one sounding in equal protection, it is more than that. The selection of the Board is one step in a legislative process. This Court has traditionally refused to review intermediate steps in a state legislative process. In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224 (1912) this Court, in a discussion of the validity of a proposition adopted by the initiative process, held that the way the people of a state choose to exercise legislative power is a question relating to the form of government. Even though the *Pacific States* petitioners raised their claim as one in equal protection, because the United States Constitution reserves the Article IV, § 4 guaranty of a "republican form of government" for congressional rather than judicial enforcement, this Court found the question to be nonjusticiable.

If, hypothetically, this Court were to assume responsibility for determining Missouri law and were then to decide that—in spite of the contrary decisions by the Missouri courts—that the Missouri Constitution required members of the Board to be "freeholders" in the property-law sense of the term, the Court would have to consider whether it had the power to look into the structure of Missouri's legislative processes.

1. This Court may not review questions that depend upon the legitimacy of the form of state government.

Luther v. Borden, 7 How. (48 U.S.) 1 (1849) was nominally an action in trespass. The putative trespassors

claimed that their action was justified as the action of lawful agents of the government of the State of Rhode Island. The plaintiffs argued that the state government had been displaced and that, therefore, the defendants were liable for their actions in trespass. This Court looked to the decision of the state courts. The state courts determined that, under the laws of the state, defendants' government was legitimate, plaintiffs' government was not legitimate, and that there had been no trespass. This Court followed its "well settled rule" that "the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State." *Id.* at 40.

The Court went on to discuss a series of practical problems, most notably an absence of judicial standards, that prevented courts from declaring one government or another to be legitimate. In addition to the practical problems, however, the Court found that the United States Constitution specifically reserved the power to determine which government was established within a state to the political branches of government. The Court speculated that if the Congress were faced with competing governments' claims to legitimacy that it would not seat the delegates of a usurping government. In addition to that reservation, however, the Congress gave the President the power to call out the militia to protect a state government from insurrection. *Id.* at 43. Such power necessarily includes the authority to determine which of competing governments is the legitimate one.

Luther v. Borden is like the instant litigation in that the courts of the state recognize the Board as a legitimate part of the governmental process. The Missouri Su-

preme Court has upheld the authority of the Board to participate in the legislative process. *State ex rel. Dalton v. Metropolitan St. Louis Sewer District*, 275 S.W.2d 225, 228 (Mo. 1955). The most recent pronouncements of the Missouri courts appear in the very cases from which the Contestants appeal. Like the charter government in *Luther*, the Board of Freeholders is a part of Missouri government.

The next significant development in judicial review of state governmental structures occurred in *Pacific States Telephone & Telegraph v. Oregon*, 223 U.S. 118, 32 S.Ct. 224 (1912). In that case, this Court considered a challenge to a tax that the people of the State of Oregon adopted by way of the initiative process. Pacific States attacked the tax on six grounds, the first of which was the denial of the equal protection of the laws, the second of which was the abrogation of the federal guaranty of a republican form of government. *Id.* at 137, 32 S.Ct. at 226. The Court found that the six propositions really amounted

> to but one, since they are all based upon the single contention that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of article 4 of the Constitution, that "the United States shall guarantee to every state in this Union a republican form of government . . ."

Id. After discussing *Luther v. Borden*, the Court looked at the particular allegations. In disposing of the equal protection claim, the Court noted that the plaintiff was not complaining that the state could not pass a tax or that the tax applied to it in some unfair way:

> If such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

Id. at 150-51, 32 S.Ct. at 231.

The most thorough analysis of the relationship between political questions and the equal protection of the laws to appear in recent years occurred in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962). Justice Brennan considered and distinguished *Luther* and *Pacific States*. *Luther*, he wrote, was instructive only in that it held "that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Id.* at 223, 82 S.Ct. at 713.

Pacific States, the Court wrote, deserved "special attention." *Id.* at 227, 82 S.Ct. at 715. After quoting the language set forth in the preceding section, the Court

contrasted *Pacific States* from a series of other cases in which guaranty clause questions had been joined with equal protection or due process claims. In *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260 (1917), the Court refused to consider whether a worker's compensation act violated the Guaranty Clause, but considered and rejected due process and equal protection arguments. In *O'Neill v. Leamer*, 239 U.S. 244, 36 S.Ct. 54 (1915), the Court refused to consider whether Nebraska's delegation of power to form drainage districts violated the guaranty clause, but considered and rejected the contention that the condemnation of property against which an injunction was sought had not been for a public purpose.

Justice Brennan suggested that the dividing line between the equal protection clause and the guaranty clause was set forth in *Gomillion v. Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 130 (1960), in which this Court observed that:

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

Baker at 231, 82 S.Ct. at 717. Thus, when Tennessee used its power to dilute the votes of certain citizens, Tennessee circumvented a federally protected right. Before this Court will, under *Baker*, inquire into the applicability of the equal protection clause, it will ask whether the means through which the people of the state have decided to put questions on the ballot is wholly within the domain of state interest. Appellee Governments submit that the answer to that question is an emphatic "Yes."

2. The process of which the selection of members for a Board of Freeholders is a part relates to the structure of state government and, as such, is wholly within the domain of state interest and not subject to federal judicial review.

The subject of this litigation, § 30, became part of the law of the State of Missouri by means of the initiative petition process on November 4, 1924. The process was not created by the state legislature and imposed upon an unwilling people. A majority of the people of the state authorized the creation of a third legislative process—the first being a bi-cameral General Assembly and the second being the initiative petition process itself.

Contestants attack the structure of the state's legislative process. They do not contend that the state or the people of metropolitan St. Louis lack the power to reorganize the governments of St. Louis City and St. Louis County. Such an argument, however frivolous, would at least be justiciable. *See Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40 (1907). Contestants do not suggest that the process has created or might create laws that would be inconsistent with the United States Constitution. If such a law were passed, the question of its validity would be appropriate for judicial review. In such a case, the review would be upon law as a law, and not upon law-making as law-making. *See Pacific States* at 150, 32 S.Ct. at 231.

Contestants cannot, however, raise such an allegation in this litigation. Because this litigation began before any plan had been proposed, it would have been idle to speculate that any such state law would or would not conform with the federal law. Any attack on the plan is premature.

Instead, Contestants attack a legislative process, the means through which the people of the State of Missouri have elected to exercise legislative power. Neither the state nor the federal judiciary is needed to *protect* the people—who adopted the legislative scheme by way of direct election—*from* the people, who will adopt or reject any proposed plan by direct election. Contestants attack a legislative process which, *like* the one the Court refused to review in *Pacific States,* and *unlike* the one reviewed in *Baker v. Carr,* allows every affected citizen an unrestricted right to vote. Whether the structure of the process through which Missouri makes its laws—that is the most salient feature of the form of the government—meets constitutional standards is a question reserved under the federal constitution to the Congress. U.S. Const. art. IV, § 4.

Justice Woodbury, who dissented from *Luther v. Borden* on a question of martial law, concurred strongly on the political insolubility of the question presented. His analysis of the relationship between the judiciary, the legislature and the people is in harmony with the Opinion of the Court on this point and highly persuasive in the instant case:

> [I]nstead of controlling the people in political affairs, the judiciary in our system was designed rather to control individuals, on the one hand, when encroaching, or to defend them, on the other, under the Constitution and the laws, when they are encroached upon. And if the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws

and Constitution, than on the people themselves in their primary capacity as makers and amenders of constitutions.

Hence, the judiciary power is not regarded by elementary writers or politics and jurisprudence as a power co-ordinate or commensurate with that of the people themselves, but rather co-ordinate with that of the legislature. Kendall v. U. States, 12 Peters, 526. Hence, too, the following view was urged, when the adoption of the Constitution was under consideration:—"It is the more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the *latter* within the limits assigned to their authority." (Federalist, No. 77, by Hamilton.) "Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both," &c., &c.

7 How. (48 U.S.) at 48, 53 (Woodbury, J., dissenting on other grounds).

How the state decides to put a proposition on the ballot is, to echo *Gomillion,* wholly within the domain of state interests. This governmental structure, created by all of the people, and having no effect unless approved by all of the people, does not impinge upon the rights of any person. As a result, any question of the legitimacy of the "Board of Freeholders" legislative process is political, not justiciable, as this Court has held. This question is not the appropriate object of review in this, or any other, federal court.

3. The political character of the questions presented in this case can be seen in the result of declaring the process to be unconstitutional.

This Court recognized, in *Luther v. Borden*, 7 How. (48 U.S.) 1 (1848), that there are serious ramifications to reviewing the lawfulness of the form of government. As the Chief Justice observed:

> the question presented is certainly a very serious one: For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, —if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; . . . and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.
>
> When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Id. at 38-39.

A judicial invalidation of the Board of Freeholder legislative process would present all the problems the Court found in *Luther v. Borden*. If the process is illegal, what is the effect of the laws enacted pursuant to plans set forth by *prior* Boards? Specifically, what happens to the Metropolitan St. Louis Sewer District, created through this process over thirty-five years ago? What happens to the fees paid to the District in the intervening years? Who owns the property the District has condemned?

The years that have elapsed since *Luther v. Borden*, have brought complications that the *Luther* Court could not have imagined. What happens to the Social Security payments made on behalf of the illegal employees of an illegally created Sewer District? Shall—as the *Luther* Court wondered, the officers who carried out the decisions and policies of an apparently legitimate governmental body be "answerable as trespassers, if not in some cases as criminals"? *Id.* at 39.

The parallels between this case and *Luther* underscore the similarity of the processes under review. This Court should be similarly circumspect when considering the propriety of review.

II. THIS COURT MAY NOT REVIEW THE CHALLENGE TO § 30 AS APPLIED.

The second possible equal protection challenge to a state statute is that although the statute is facially neutral, it is unconstitutional as applied. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1073 (1886). Although not raised in the Jurisdictional Statement, Contestants argued that § 30 was unconstitutionally applied at every preceding stage of the litigation and have again raised it in their Brief on the Merits. Although this Court normally refuses to consider issues improperly raised, pursuant to Rule 34.1(a) this Court may elect to review these questions if they present "plain error."

Aside from the failure to preserve the issue, the appointments of the Governor, Mayor and County Executive are, for two reasons, beyond the review of this Court. First, the Contestants lack the standing to challenge the actions of these executives. Second, because the appointments to the Board are discretionary executive acts, the appointments are subject to political accountability, but not to judicial review.

A. Contestants Lack the Necessary Standing to Challenge the Acts of the Appointing Officials.

As this litigation moves from the state courts to the federal courts, it is again appropriate to raise the question of the Contestants' standing to assert federal constitutional claims. The case or controversy requirement of Article III of the United States Constitution applies to this Court in appellate matters just as it does to the federal district court hearing a newly-filed case. *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752 (1961). Because a state court system is free to adopt a more expansive concept of standing—or of "cases and controversies" generally—it is always possible that a dispute may have begun in the state courts that cannot, consistently with Article III and other federal norms of jurisdiction and justiciability, continue in the federal courts. *Id.*

To bring this action into a federal court, the Contestants must demonstrate that they have a personal stake in the outcome. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962). This requirement focuses not upon the claim, but upon the party seeking to invoke federal jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968). The standing rule has two theoretical bases. On one hand, the case or controversy requirement limits Article III judicial power to protect only the complaining party from injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975). Additionally, as a "prudential" matter, this Court has limited federal jurisdiction to exclude generalized grievances, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-27, 94 S.Ct. 2925, 2932-35 (1974), or complaints based upon the rights of third parties, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S.Ct. 1917, 1925 (1976). Absent a showing of standing, the exercise of federal jurisdiction is a gratuitous act, and thus inconsistent with the limitations of Article III. *Id.* at 38, 96 S.Ct. at 1924.

This Court has measured the existence of this stake by way of a two-part test. A would-be federal litigant must show that he has suffered or will suffer a distinct and palpable injury and that there is a fairly traceable causal connection between the claimed injury and the challenged conduct. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79, 98 S.Ct. 2620, 2633-34 (1978).

At one level, the decisions of this Court in *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970) and *Chappelle v. Greater Baton Rouge Airport District*, 329 So.2d 810 (La. App. 1976), *rev'd*, 431 U.S. 159, 97 S.Ct. 2162 (1977), might appear to cast some doubt upon the gravity of Contestants' standing problem. Unlike Contestants' attack upon the application of the Missouri law, however, these two cases challenged a statute on its face. A statutory bar—when, for example, it prevents a couple from being married, *see Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967)—may be palpable and distinct. The allegation that a public official failed

or refused to think about someone is somewhat less plainly injurious.

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975) illustrates the standing problems contained in the present litigation. In that case, the petitioners claimed that a town's zoning ordinance—both by its terms and as enforced —effectively excluded persons with low and moderate incomes from living in the town. The alleged effect of the ordinance and its application was (1) the exclusion of minority racial and ethnic groups, (2) the imposition of higher taxes in petitioners' town, to pay for subsidized low-income housing, and (3) the prevention of some of the petitioners from moving into the town. Petitioners asked the court to declare the ordinance to be unconstitutional on its face, to enjoin its enforcement, to order enactment of new zoning ordinances, and for damages. This Court agreed with the two lower federal courts in holding that the petitioners lacked standing to proceed.

The first set of petitioners were persons of low or moderate income who were members of minority racial or ethnic groups. This Court specifically held that:

> The fact that these petitioners share attributes common to persons who may have been excluded . . . is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they have personally been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, none may

> seek relief on behalf of himself or any other members of the class.

Id. at 502, 95 S.Ct. at 2207 (quotation omitted). Contestants and the class they purportedly represent, suffer the same disability. At no stage of this litigation has any person suggested that he asked to be considered for a position on the Board.

The second set of *Warth* petitioners shared the characteristics of the first set, but in addition produced evidence that they had attempted to obtain housing in the target city, yet failed to find anything suitable. The Court was willing to assume that respondents' actions increased housing prices, but refused to find that petitioners' exclusion resulted:

> in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it may reasonably be inferred that, absent the respondents' restrictive . . . practices, there is a substantial probability that they would have been able [to act as they wished] . . . and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.

Id. at 504, 95 S.Ct. at 2208 (citation omitted). This second set of *Warth* petitioners sit in the same position that the Contestants would occupy if they had alleged that they had solicited a position on the Board. In order to obtain standing, Contestants must prove that but for the allegedly discriminatory conduct, they would be members of the Board. In the present case, Contestants have not even made such an allegation.

If Contestants *had* made the proper allegations, their claim would fail. The parties have stipulated that the

named Contestants are residents of St. Louis County. County Executive McNary nominated nine persons to the Board *without considering whether they owned real property*. Thus, the fact that these Contestants or members of the class they purport to represent were not named to the Board had nothing to do with the ownership of real property. The Contestants were not named to the Board because County Executive McNary identified nine other individuals whom, for whatever reasons he deemed appropriate, he considered more worthy of selection. Because Contestants cannot trace a causal connection between an injury to themselves and the challenged conduct, they lack standing to proceed in federal court.

B. Deference to Executive Appointment Powers

Should this Court decide to review the challenge to § 30 as applied by the appointing officials, it must first resolve the question raised, but left undecided, in *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323 (1974). In that case the Mayor of Philadelphia (Hon. Frank Rizzo) argued that the judiciary did not have the power to review the discretionary acts of elected officials. The Mayor grounded his argument on two famous passages from *Marbury v. Madison*, 1 Cranch. (5 U.S.) 137 (1803):

> The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation.

1 Cranch. (5 U.S.) at 169, and:

> Where the head of a department acts in a case in which executive discretion is to be exercised; . . . it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

Id. at 170-71. This theme has been echoed in a variety of federal courts over the years. In 1951, Judge Prettyman of the District of Columbia Circuit Court of Appeals advanced an explanation for this policy:

> The judiciary cannot assume responsibility for the sufficiency of the qualifications of the executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power. The courts cannot hold as a rule of law that grounds for disqualification of subordinate executive employees reasonable in the mind of the executive must also be reasonable in the mind of the courts. It is inescapable from the Constitution's separation of powers that the qualification and disqualification of executive employees is for executive determination; . . . .

Bailey v. Richardson, 182 F.2d 46, 62 (D.C. Cir. 1950), *affirmed*, 341 U.S. 918, 71 S.Ct. 669 (1951).

The essence of the elective process is that the electors give their authorization to a person to exercise his discretion, be that person elected to executive, legislative or judicial office. As Chief Justice Marshall wrote in *Marbury v. Madison, supra* at 166:

> The conclusion from this reasoning is, that where the heads of departments are political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which

> the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.

The Fifth Circuit Court of Appeals has had occasion to consider the application of the *Mayor of Philadelphia* reasoning in two of its cases. In *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976), the court considered that:

> the alleged discrimination relates neither to employment in general nor to governmental functions which are devoid of political or policymaking content. It involves instead the exercise of a discretionary power, allocated by Alabama law to the chief elected official of the state, with substantial policymaking importance.
>
> . . .
>
> Of course, if the policies espoused by the governor [the Hon. George C. Wallace] and put into practice by his appointees violate the constitutional rights of any Alabama citizens, the courts stand ready to provide a remedy. But until that is shown to be the case, the governor must be accorded the right to use subjective criteria in selecting the persons whom he appoints to implement his policies.

James v. Wallace, 533 F.2d 963, 968 (5th Cir. 1976) (dicta).

On the other hand, in *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981), *aff'd sub nom. Hightower v. Searcy*, 455 U.S. 984, 102 S.Ct. 1605 (1982), the same court examined a school board. The board was created as a private corporation in which the board members served for life. Retiring members met with the remainder of the board to select a new member. When this private board evolved into the public school board, it retained its traditional method of selecting board members. This board, the court

concluded, was not cloaked with the same political mandate and review process that caused the courts to defer to its acts of appointment. The court inquired into the appointment process and determined that the board members had engaged in discriminatory practices.

The voters of St. Louis City and St. Louis County will review the discretionary appointments. First, at some point, the plan proposed by the Board will appear on the ballot. Second, when the appointing officials seek to remain in office, the voters will advise them of the suitability of their discretionary actions. For the judiciary to review the discretionary appointments of the Governor, the County Executive and the Mayor would violate the constitutional mandate of separation of powers, ignore any considerations of judicial self-restraint and vitiate the elective process which is both the ostensible object of the Contestants' solicitude, *see* J.A. 31, 38 ¶ 16, and the basis on which our government was conceived. A. Lincoln, Gettysburg Address (referring to a government of, by and for the people).

The Governor of Missouri, the Mayor of St. Louis City and the County Executive of St. Louis County, like Governor Wallace and Mayor Rizzo of Philadelphia, are all elected executives. The Fifth Circuit's analysis in *James v. Wallace* is apposite here. As a result, § 30 gives three state officials the power to appoint members to the Board of Freeholders. This power is subject only to the legislative approval of the City and County legislative bodies, the qualifications for service embodied in the Missouri Constitution and, ultimately, the account that the appointing officials must give for their conduct to the people who elected them.

III. SECTION 30 DOES NOT DEPRIVE CONTESTANTS OF THE EQUAL PROTECTION OF THE LAWS.

As noted in a preceding section, the uniqueness of the political structure involved in this case makes it difficult to articulate the appropriate standards for review. Because this Court applies strict scrutiny in a limited number of cases, however, it is a simple matter to show that the Governments are not required to establish a compelling state interest for the alleged classification. Absent the need for a compelling state interest, this Court will ask whether there is a rational basis for the alleged classification. The Contestants cannot overcome their burden of proving irrationality. Accordingly, § 30 does not deprive Contestants of the equal protection of the laws, either on its face or as applied.

A. This Case Does Not Merit Strict Scrutiny.

Any one-paragraph synopsis of this Court's analysis of the applicable standard of review in equal protection cases will necessarily contain oversimplifications. Generally speaking, however, the first step is to ascertain whether the statutory scheme "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288 (1973). If so, the statutory scheme receives strict judicial scrutiny to ascertain whether the classification is necessary to uphold a compelling state interest. *Id.* If the classification neither burdens a suspect class, nor impinges upon a fundamental right, the only issue is whether the classification is rationally related to a legitimate state interest.

Friedman v. Rogers, 440 U.S. 1, 17, 99 S.Ct. 887, 898 (1979).

Contestants do not, nor do they allege to, belong to anything that has ever been thought to be a suspect class. Indeed, given Contestants' brand new evidence on the number of individuals in the subject city, county and state who do *not* own real property, an executive concerned with advancing or preserving his political position would ignore their interests at his peril. Appellants' Brief at 8 (showing, for example, that a majority of the persons in St. Louis City do *not* own real property.)

The remaining question is whether the Governments have abridged some fundamental right. Assuming that the Governments have abridged some "right" belonging to Contestants—an assumption for which the record provides no support—it is not a fundamental right that would trigger a strict level of review. The process implicated in the instant litigation is wholly unlike any of the analogies urged by the Contestants.

1. The facts in this litigation are significantly different from candidate ballot access cases.

The Board of Freeholders process is not, as Contestants suggest, like a political primary. At the outset, a vote on a proposition differs significantly from a vote for public officials. In a referendum, the expression of voter will is direct, meaning that there is no need to assure that the interests of any particular class of voters is adequately represented. *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 266, 97 S.Ct. 1047, 1052 (1977). When the people vote for candidates, someone will win. The winner will have discretionary power to help or hurt the people, with-

out seeking further counsel or approval for his actions. For that reason, it is important that every step of the process meet the strictest constitutional muster. *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 1495-96 (1969). Like *Pacific States* and *Lockport*, the Board of Freeholders legislative process guarantees that no person can take any action without an affirmative vote of the people.

Second, although individual persons have constitutional rights, which may involve the application of equal protection of the laws, plans for the reorganization of metropolitan St. Louis are not constitutionally protected. The only ballot involved in the Board of Freeholders legislative process is that upon which the citizens of metropolitan St. Louis will vote. Contestants have not proposed a competing plan. The competing plan has no "right" to appear on any ballot. Moreover, any discussion of the right to appear on a ballot (whether it belongs to a person or an idea) strays far from the contention in this lawsuit, that a specified class of persons had a right to be considered for appointment to a particular board.

2. The facts in this case are significantly different from the voting rights cases.

The Board of Freeholders legislative process is not remotely like any of the election rights cases advanced by Contestants or discussed by the Missouri Supreme Court. In these cases the votes of one class of persons is diluted or denied. This Court has divided the cases into two varieties. On one hand, if the subject of the voting affects voters and non-voters alike, denial of the franchise constitutes a denial of the equal protection of the laws. This rule

applies both to elections of persons, *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, 397 U.S. 50, 90 S.Ct. 791 (1971) (governing board of municipal junior college); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886 (1969) (school board), and to propositions. *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969) (revenue bonds); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990 (1970) (general obligation bonds). The legal issue is the same if one class of votes is diluted in some respect. *E.g., Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962). Depriving one group of the franchise can only be justified by showing some overriding interest in one class of citizens that the State is entitled to recognize. In each of the cited cases, the differences between the interests of two classes of citizens were not sufficiently substantial to justify restricting or diluting the votes of one group.

On the other hand, if the state can demonstrate a special relationship between one class of persons and the subject of an election, the state may limit the franchise to a particular class of citizens. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 728, 93 S.Ct. 1224, 1229-30 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 93 S.Ct. 1237 (1973); *Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811 (1981). Taken together, the two lines of cases specify a bright-line rule: "No government can limit the right to vote without having a very good reason."

The whole subject matter is irrelevant to the matter at hand. Missouri law affords all persons living in St. Louis City and St. Louis County an absolutely unfettered right to vote on whatever plan the Board might

compose. There is no allegation that any person has been disenfranchised or that his vote has in some way been diluted.

The major distinction between every case Contestants cite and the present facts is, quite simply, that the Board of Freeholder legislative process in no way restricts any person's right to vote. Thus, none of the analysis from the preceding cases applies. The situation approximates that considered by this Court in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 99 S.Ct. 383 (1978). In that case this Court considered the plight of persons who lived outside the city limits of Tuscaloosa yet, pursuant to state law, were subject to its police protection and taxing authority. This Court considered the propriety of extending the franchise to the outlanders or enjoining extraterritorial enforcement of the municipal powers. The Court found that because the right to vote extended only to residents of Tuscaloosa, voting rights were not implicated in the case.

> Thus stripped of its voting rights attire, the equal protection issue presented by appellants becomes whether the Alabama statutes giving extraterritorial force to certain municipal ordinances and powers bear some rational relationship to a legitimate state purpose.

Id. at 390. The Alabama situation is, of course, very different from the present statute. The values involved in the two cases are, however, very similar.

When examining questions involving political rights or privileges, regulations upon the franchise are viewed most suspiciously. When the question of voting rights is stripped away, two questions remain. First, does the

issue present a justiciable controversy? Second, does the state have a rational basis to support its classification?

Although justiciability has been discussed at great length in connection with the structure of a state's legislative processes, there is one more point that merits consideration. Contestants claim that they wish to be "considered" for appointment. Consideration, however, is a process, rather than a benefit to be conferred. As a result, it is a difficult commodity to measure for equality of application. Moreover, the harm claimed from a failure to consider persons who do not own real estate is that the resulting plan will be skewed to favor persons who own real property. There are three obvious objections: lack of evidence, lack of ripeness, and the political impossibility of adopting such a plan when, according to Contestants' numbers, a majority of the electorate in St. Louis City would be injured thereby. Leaving aside those objections, there is no link, conceptual or evidentiary, between the amount of consideration given to a person and the likelihood of his appointment. What Contestants want is effective participation in the process of policy formulation.

The relative effectiveness of different groups of persons in policy formulation is, if anything, more difficult to measure than the quantity and quality of political consideration. Rather than engage in judicially unmanageable speculation, this Court stepped back and reached the logical solution. In *Kramer v. Union Free School District*, 395 U.S. 621, 629 n.7, 89 S.Ct. 1886, 1889 n.7 (1969), this Court observed that:

> the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes. For example,

> if school board members are appointed by the mayor, the district residents may effect a change in the board's membership or policies by their votes for the mayor. . . . Each resident's formal influence is perhaps indirect, but it is equal to that of other residents.

So long as the electoral process provides redress for real or imagined injuries that Contestants may suffer at the hands of elected officials, they have a means of participation in the system that is exactly equal to that of every other citizen. Neither the process nor the actions of the elected officials infringes upon any right of the Contestants. There is no need for judicial intervention.

Having already discussed the justiciability of the controversy, the Governments turn to the rationality of the alleged landowner requirement.

B. There Would Be a Rational Basis for a Landowner Requirement.

The rules under which this Court measures challenges to the rational basis for state laws are well-known and well-settled. The state has wide latitude in establishing classifications. The connection between the statutory objective and the classification does not require "mathematical" precision, so long as there is a reasonable relationship between the two. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340 (1911).

Contestants have, in the past, agreed that residency, durational, age and educational qualifications are reasonable qualifications for Board membership. Ownership of land would rationally be regarded a similar qualification. Contestants have sought to distinguish property

ownership from other reasonable qualifications by contending that individuals who own only a small portion of land may not be qualified to serve on the Board. *See* Appellants' Brief at 19. Contestants' reservation mirrors that of Englishmen in the era of Henry VI, who required that a citizen own real property of a certain minimum value before dignifying it with the title of a freehold. *See* 1 W. Blackstone, Commentaries on the Laws of England 165-67 (1765).

1. Property ownership is a prospective durational residency requirement.

Blackstone reports that England limited the franchise to persons who owned a specified amount of real property because those persons were self-sufficient enough that they could be depended upon to think and act independently of other people's wills. *Id.* In twentieth-century America, we have a higher regard for the intellects of persons who do not own real property. Nonetheless, the exercise of purchasing or owning a home is an educational experience like none other. Someone who has tested the residential real estate market in a major metropolitan area acquires first-hand knowledge of the value of good schools, sewer systems[5] and the other problems and amenities of urban life. The distinctions between property and income taxes become very real and very apparent to someone who buys a home.

Moreover, a person who purchases a home has a tangible stake in the long term future of his area. Some-

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5. An earlier Board of Freeholders proposed the Metropolitan St. Louis Sewer District. The proposal was adopted by the voters. *See State ex rel. Dalton v. Metropolitan St. Louis Sewer District*, 275 S.W.2d 225 (Mo. 1955).

one who owns a smaller estate in real estate may wish his community well, but if problems arise or if the grass looks greener in the next county, it is relatively simple for him to sublease or refuse to renew his lease. The costs associated with selling a home make the homeowner a more stable member of the community. This Court routinely upholds statutes imposing durational residency requirements on those people who seek to influence public policy. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 96 S.Ct. 1154 (1976). Presumably, someone who has lived in an area for a period of time is in touch with the attitudes of the people he serves. Such a requirement looks backward. Missouri, consistent with the ideals of federalism, is experimenting. *New State Ice Co. v. Leibman*, 285 U.S. 262, 280, 311, 52 S.Ct. 371, 375, 387 (1932) (Brandeis, J., dissenting); *see Addington v. Texas*, 441 U.S. 418, 431, 99 S.Ct. 1804, 1812 (1979). The transaction costs incident to selling a home make it likely that the homeowner will be in the area in the future. The size of his investment indicates that he has a real stake in maintaining or improving the quality of life in his community. Rather than rely upon a policy maker's knowledge of his fellows to make him a good policy maker, is it irrational to suppose that one who knows that he will live with a particular governmental structure for many years to come will be more careful in creating those structures than someone who can walk away from a mistake?

2. Standard of review.

The burden of proof, the standard of review and the presumptions attached to fourteenth amendment challenges to state legislation are well-known. This Court

recently collected and discussed the authorities in *New York State Club Association v. City of New York*, ... U.S. ....., ..., 108 S.Ct. 2225, 2236 (1988).

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105 (1961). Legislative classifications, however, are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party not on the party defending the statute: those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 937, 949 (1979). Phrased differently, the constitutional safeguard is offended only if the classification rests on grounds "wholly irrelevant to the achievement of the State's objective." *McGowan* at 425-26, 81 S.Ct. at 1105. The Contestants can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784 (1938).

Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 67 S.Ct. 910 (1947), will probably remain the standard against which rational bases are tested. In that case, this Court reviewed a Louisiana statute that required an individual seeking a harbor pilot's license to complete an apprenticeship term. This Court upheld the statute in the face of a challenge that pilots chose "with occasional exception, only relatives and friends"

to serve the apprenticeship. *Id.* at 555, 67 S.Ct. at 912. In rejecting plaintiffs' claim, this Court acknowledged the role of nepotism in the selection process, but upheld the constitutionality of the application of the statute on the ground that it was rational to conclude that "the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute . . . might have prompted the legislature to permit Louisiana pilot officers to select those with whom they will serve." *Id.* at 563, 67 S.Ct. at 916. If familial relationships constitute a reasonable basis for selecting apprentices for a pilot's license, a landowner requirement certainly constitutes a reasonable requirement for membership on the Board.

Neither the text of the Missouri Constitution nor the acts of the appointing authorities in any way infringed upon any of the Contestants' constitutionally protected rights. Because Contestants are not a suspect class nor is any alleged right one this Court has thought to be fundamental, this litigation does not call for strict scrutiny of the alleged classification. The citizens of the state would, however, have had rational reasons for limiting the membership of the Board to persons who owned real property.

CONCLUSION

This litigation does not present a justiciable case or controversy. Accordingly, the appeal should be dismissed.

Alternatively, and notwithstanding the absence of a federal judicial controversy, both Article VI, § 30 of the Missouri Constitution and the actions of the Appellee government officials were perfectly reasonable and in accordance with federal law. Should this Court reach

the merits of the litigation, the decisions of the Missouri courts should be affirmed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General of Missouri
SIMON B. BUCKNER
(Counsel of Record)
Assistant Attorney General
3100 Broadway - Suite 609
Kansas City, Missouri 64111
(816) 531-4207
Attorneys for Appellees
State of Missouri and
Governor John D. Ashcroft

THOMAS W. WEHRLE
St. Louis County Counselor
ANDREW J. MINARDI
Associate County Counselor
7900 Forsyth
Clayton, Missouri 63105
Attorneys for Appellee County
Executive Gene McNary

JAMES L. WILSON
St. Louis City Counselor
EUGENE P. FREEMAN
Deputy City Counselor
City of St. Louis
Tucker and Market Streets
St. Louis, Missouri 63103
Attorneys for Appellee Mayor
Vincent C. Schoemehl, Jr.

April 7, 1989

REPLY

BRIEF

No. 88-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

VS.

WAYNE L. MILLSAP, Chairman, JOSEPH S. BALCER, ROBERT L. BANNISTER, SANDRA HASSER BENNETT, ALLEN S. BOSTON, CLAUDE BROWN, WILLIAM G. COCOS, JR., JO CURRAN, ALBERT H. HAMEL, THOMAS P. DUNNE, C. FRAN EMERSON, GRETTA FORRESTER, WILLIAM J. HARRISON, J. P. MORGAN, CATHERINE REA, DANIEL SCHLAFLY, HENRY S. STOLAR, LUCILLE WALTON and MARGARET BUSH WILSON, Members of the St. Louis City - County Board of Freeholders, THE STATE OF MISSOURI, JOHN D. ASHCROFT, Governor of Missouri, GENE MCNARY, County Executive of St. Louis County, Missouri, VINCENT C. SCHOEMEHL, JR., Mayor of the City of St. Louis, Missouri,

Appellees.

On Appeal from The Supreme Court of Missouri

REPLY BRIEF FOR THE APPELLANTS

JESS W. ULLOM
MARK D. MITTLEMAN
KAVENEY, BEACH, BOND,
ULLOM & BURCKE
222 South Central, Suite 900
St. Louis, Missouri 63105
(314) 863-8484

KEVIN M. O'KEEFE*
*(*Counsel of Record*)
CHARLES W. BOBINETTE
UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE
906 Olive Street, Suite 300
St. Louis, Missouri 63101
Telephone: (314) 621-9550

Attorneys for Appellants

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

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Appellees.

On Appeal from The Supreme Court of Missouri

REPLY BRIEF FOR THE APPELLANTS

SUMMARY OF THE ARGUMENT

Appellees have abandoned the position of the Missouri Supreme Court and have presented four new arguments which Appellants address in this Reply Brief.

I. Appellees argue that Appellants lack standing to contest the constitutionality of § 30. This case is an appeal arising from a suit filed *by* Appellees *against* Appellants. The Appellant class includes every person who could be discriminated against by § 30's property ownership requirement. This Court specifically rejected the same arguments advanced here by Appellees in *Turner v. Fouche,* 396 U.S. 346 (1970). The holdings of this Court in *Turner* and *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1970) confirm that Appellants have standing in this case.

II. Appellees argue that this Court lacks jurisdiction to review the judgment below, because the structure of State government and discretionary acts of executive officials are involved. Appellees' argument would legitimize patently unconstitutional discrimination and circumvent federally protected rights. *Gomillion v. Lightfoot,* 346 U.S. 339 (1960). The application of § 30's property requirement in this instance was mandatory not discretionary, nor was the exercise of policy-oriented executive prerogative involved. *Turner v. Fouche,* supra.

III. Appellees argue that Missouri law does not require ownership of real property as a condition of eligibility for public service under § 30. There is no question of state law in this appeal. Appellees' argument is premised on inferences and assumptions they seek to draw from the unpublished memorandum of the trial court, which Appellees now suggest take precedence over the explicit holdings of the Missouri Supreme Court. The opinion of the trial court is entitled to no deference. *MFA Mutual Insurance Co. v. Home Mutual Insurance Co.,* 629 S.W.2d 447 (Mo.App. 1981). The Missouri Supreme Court has specifically defined the term "freeholder" as used in the Missouri Constitution to mean an owner of real property. *Shively v. Lankford,* 74 S.W. 835 (Mo. 1903). The law of Missouri, as erroneously declared by the highest court of the State, permits invidious discrimination in eligibility for service on a Board of Freeholders under § 30. *Millsap v. Quinn,* 757 S.W.2d 591 (Mo.banc 1988); *S.J. A-1.*

IV. Appellees argue that property ownership is rationally related to eligibility for service on a Board of Freeholders. The suggestions made by Appellees in support of the discriminatory disqualification in § 30 and actually applied in this instance were previously rejected by this Court in *Turner v. Fouche,* supra.

Appellees arguments lack merit. The judgment of the Missouri Supreme Court should be reversed.

ARGUMENT

Introduction

It is the position of Appellants that the protections of the Fourteenth Amendment are available to remedy discriminatory state actions, and that there is no reasonable necessity or rational basis to discriminate against non-property owners and deny them an equal opportunity to be eligible for service on a Board of Freeholders under Article VI, Section 30 of the Missouri Constitution.

Almost twenty years ago this Court held the Equal Protection Clause of the Fourteenth Amendment guarantees to every citizen the right to be eligible for public service "without the burden of invidiously discriminatory disqualifications." *Turner v. Fouche,* 396 U.S. 346, 362 (1970). State action which affords the opportunity of public office to some, while denying it to others, is unconstitutional if the distinction is based upon criteria which violate the constitutional guarantee of equal protection of the laws. *Id.* at 362-363.

The Missouri Supreme Court bypassed the dictates of *Turner.* The judgment appealed here concluded that a Board of Freeholders does not exercise "general governmental powers" and that, therefore, the Equal Protection Clause is entirely inapplicable to claims of discrimination in eligibility for service on the Board. *Millsap v. Quinn,* 757 S.W.2d 591, 595 (Mo.banc 1988); *S.J. A-1, A-7.*

Appellees appear to have abandoned the position of the Missouri Supreme Court. Instead, the principal arguments now advanced by Appellees are: (1) Appellants lack standing to seek relief under the Fourteenth Amendment from any discriminatory state actions which occurred in this instance; (2) this Court lacks jurisdiction to review this case since it concerns matters of state government structure and executive discretion, both of which are beyond the purview of the Court; (3) there is

no legitimacy to Appellants' claims because Missouri law does not require discrimination against non-freeholders; and (4) property ownership is rationally related to service on a Board of Freeholders.

Appellants will show these arguments lack merit.

I

Appellants Have Standing To Seek Relief From The Discriminatory Requirements Of Section 30 And From The Actual Application Of That Discrimination In The Appointment Of The Board Of Freeholders.

Appellees filed this case as a class action, naming Appellants as defendants and representatives of the class. *J.A. 3.* Appellees' motion for summary judgment stated that all requisite elements for a class action were satisfied and that Appellants fairly and adequately represent the interests of a class consisting of resident taxpayers, electors and individuals who do not own real property. *J.A. 13,* ¶9. Appellees requested the court to declare that § 30 does not "violate the United States Constitution" and to hold that Appellants "have fully and adequately represented the interests of the class." *J.A. 16, 17.*

Both the trial court and the Missouri Supreme Court approved the named Appellants as representatives of the class consisting of every person in the State of Missouri who could be subjected to discrimination under § 30 on the basis of property ownership. *Millsap v. Quinn,* No. 572794, St. Louis County Circuit Court; *S.J. A-20;* and *Millsap v. Quinn,* 757 S.W.2d 591, 593, *n.* 3; *S.J. A-3.*

Unbelievably, having filed this action and succeeded in obtaining a judgment against Appellants, Appellees now claim that Appellants lack standing to contest the constitutionality of § 30 on this appeal.

The fact that the members of the Appellant class do not own property is, in and of itself, sufficient to confer standing to litigate the federal constitutional claims raised by the pleadings. The same arguments about standing which Appelles make in their Brief were specifically rejected by this Court in *Turner:*

> Georgia's contention that no appellant has standing to raise this claim is without merit.
>
> • • •
>
> Georgia also argues that the question is not properly before us because the record is devoid of evidence that the freeholder requirement actually operated to exclude anyone from the Taliaferro County board of education. But the appellant Heath's allegation that he is not a freeholder is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law.

Turner v. Fouche, 396 U.S. 346, 361, *n.* 23 (1970).

This case is based on the simple proposition that, under color of state law, Appellants have been systematically excluded from consideration for public service solely because of their non-property ownership status. There is no jurisdictional or procedural bar to Appellants' attack on such discrimination. *See Carter v. Jury Commission of Greene County,* 396 U.S. 320, 329-330 (1970).

The primary argument advanced by Appellees to thwart Appellants' claim of an as-applied equal protection violation is their assertion that Appellants lack standing.[1] That argument

[1] Appellees' Brief insinuates that, although it has been presented and preserved at every stage of the proceedings below, there may be some question as to whether Appellants properly raised their as-applied claim in the *Questions Presented* portion of their Statement of Jurisdiction. Rules 34.1(a) and 15.1 provide that every subsidiary question "fairly included" in the questions presented in the Statement of Jurisdiction may be addressed in this Court. Appellants suggest that all three questions listed by Appellants fairly include the as-applied issue.

being without merit, and the stipulated facts having proven the claim, Appellants are entitled to the relief they seek.

II

This Court Has Jurisdiction To Determine The Constitutionality Of Article VI, Section 30, Both On Its Face And As Applied, Under The Fourteenth Amendment.

Appellees argue that the only forum for resolution of the issues presented in this case is political. They assert that this Court lacks jurisdiction to review the claims, which are purportedly matters of state government structure and executive discretion. Leaving aside the inconsistency of making such arguments in a case which they themselves filed, the arguments have no merit.

Appellees first attempt to shelter themselves from the federal judiciary by asserting that the Board of Freeholders is an integral part of the "structure" of Missouri government. *Appellees' Brief, 21.* Followed to its logical conclusion, Appellees' assertion would also mean a requirement that any appointee to a Board created under § 30 must be a white, Anglo-Saxon, male would also be permissible. Appellees have also equated the Board of Freeholders with the initiative process. An initiative system which affords only property owners the opportunity to submit ballot proposals of general interest — exactly the same limitation which § 30 mandates for a Board of Freeholders — would obviously violate the Equal Protection Clause.

While Appellees base their argument about activities "wholly within the domain of state interests" on language in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), they have ignored the holding of that case as well as other portions of the paragraph they quoted in part:

> When a state exercises power wholly within the domain of state interests, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. *This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, viz, that ". . . a constitutional power cannot be used by way of condition to attain an unconsitutional result."*

Gomillion v. Lightfoot, 364 U.S. 339, 347-348 (1960) (emphasis added), quoting from *Western U. Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918).

Appellants in this case stand in the same position as the parties who suffered from state-sanctioned discrimination in the composition of the Alabama legislature in *Reynolds v. Sims*, 377 U.S. 533 (1964); the Commissioners Court of Midland County, Texas, in *Avery v. Midland County*, 390 U.S. 474 (1968); the Junior College District of Kansas City, Missouri, in *Hadley v. Junior College District*, 397 U.S. 50 (1970); and the New York City Board of Estimate in *Board of Estimate v. Morris*, No. 87-1022 (U.S. March 22, 1989). Each of these cases involved structural aspects of government established by the States concerned, or their subdivisions, which were of at least equivalent importance to those States as the Board of Freeholders is to Missouri.

The rights of the Appellant class which are infringed by § 30 are the same constitutional rights protected from state infringement by this Court in *Turner v. Fouche*, 396 U.S. 346 (1970); *Chappelle v. Greater Baton Rogue Airport District*, 431 U.S. 159 (1977); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *McDaniel v. Paty*, 435 U.S. 618, 643 (1978) (White, J., concurring in judgment); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969)[2]; *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); and countless other cases in which the right to equal protection of the laws has been so jealously guarded.

Appellees further claim that this Court may not review the case because the composition of a Board of Freeholders entails the exercise of executive discretion. But the discrimination of which Appellants complain is not discretionary, it is mandatory. The Missouri Constitution deprives the appointing authorities of discretion to make appointments from among all registered voters. The State ". . . can hardly urge that her county officials may be depended on to ignore a provision of state law." *Turner v. Fouche*, 396 U.S. 346, 361, *n.* 23 (1970).

The exclusion of the Appellant class in this case did not involve the application of subjective, policy-oriented criteria by the appointing authorities. At issue here is the application of an objective, unrelated, unnecessary, and irrational standard, property ownership, which excludes a specific and otherwise qualified segment of society from being eligible for consideration for public service.

Moreover, categorizing the actions of public officials acting under color of state law as acts of "executive discretion" does

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[2] This Court's ruling in *Cipriano* also disposes of the suggestion in Appellees' Brief that a ruling in favor of the Appellant class would render illegal the St. Louis Metropolitan Sewer District, an entity formed under § 30 procedures over thirty years ago. A judgment in favor of Appellants would no more invalidate the Sewer District than the ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964) eradicated every law adopted by the Alabama legislature between 1911 and 1964. *Reynolds*, at 540.

not strip this Court of jurisdiction to review and remedy instances of invidious discrimination. *See Batson v. Kentucky*, 476 U.S. 79 (1986), where this Court held a prosecutor's discretionary dismissal of potential jurors subject to the commands of the Equal Protection Clause, based, in part, on recognition of the rights of the rejected jurors. *Id.* at 87. In this case, not only is § 30 discriminatory on its face, but the Appellees stipulated to evidence that a property-based criterion was actually applied.

III

The Law Of Missouri Is That Declared By The Highest Court Of The State, Not The Trial Court. The Missouri Supreme Court Is In Error In Permitting Invidious Discrimination To Disqualify Non-Property Owners From Eligibility For Service On A Board Of Freeholders.

This case comes before the Court as an appeal to review a final judgment "rendered by the highest court of a State in which a decision could be had. . . ." *28 U.S.C. § 1257.* It is the law of the State of Missouri as declared by the Missouri Supreme Court which is at issue, not the unpublished memorandum of the trial court. And the Missouri Supreme Court's declaration of that law is clear and unambiguous: the Fourteenth Amendment's guarantee of equal protection of the laws is irrelevant to the creation of a Board of Freeholders under Article VI, Section 30 of the Missouri Constitution. *Millsap v. Quinn*, 757 S.W.2d 591, 595; *S.J. A-1, A-7.* Facial and as-applied invidious discrimination in regard to § 30 is now legal in the State of Missouri.

Appellees' Brief does not attempt to advance the reasoning or conclusion of the Missouri Supreme Court. Instead, Appellees assert the Missouri Supreme Court actually meant more than what it said, and that the law of Missouri is something other than what the Missouri Supreme Court has declared it to be. By their subjective inferences based upon assumptions, Appellees

seek to write two new holdings into the Missouri Supreme Court's judgment: (1) the trial court's conclusion that freeholder status is not a requirement for service on a Board of Freeholders; and (2) the trial judge's dictum to the effect that "freeholder" may mean something other than what the Missouri Supreme Court has previously declared.

This Court need not engage in any of the multiple assumptions and inferences suggested by Appellees. They are unnecessary and unwarranted.

A. Appellees' assertion that property ownership is not a requirement for service on a Board of Freeholders is not the law of Missouri.

Appellees claim that § 30 does not require property ownership or freeholder status for service on a Board of Freeholders. To adopt Appellees' position this Court would have to assume that the Missouri Supreme Court did not mean what it said (that "membership on the Board of Freeholders was *restricted* to owners of real property"[3]); and that the Missouri Supreme Court meant what it did *not* say (that freeholder status is not required for service on the Board of Freeholders).

Appellees' argument also requires this Court to assume: (1) the principles of appellate review have been abandoned; (2) prior decisions by the Missouri Supreme Court have been reversed; and (3) forty-seven Missouri statutes[4] and four Sections of the Missouri Constitution have been vitiated — all without the Missouri Supreme Court so much as restating, referencing, acknowledging or otherwise preserving the unpublished statements of the trial court.

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[3] *Millsap v. Quinn*, 757 S.W.2d 591, 595; *S.J. A-7* (emphasis added).

[4] Listed at *J.A. 47-54.*

The Missouri Supreme Court's opinion is clear and it has completely superseded the trial court's speculative reasoning. Missouri appellate courts give no deference to the legal conclusions of a trial court when, as here, the facts of a case are based on stipulated evidence.

> No deference is due the trial court's judgment where resolution of the controversy is a question of law. [citation omitted] We therefore examine the primary issue . . . without reference to the determination made below.

MFA Mutual Insurance Co. v. Home Mutual Insurance Co., 629 S.W.2d 447, 450 (Mo.App. 1981).

The Missouri Supreme Court has defined the term "freeholder" as used in the State Constitution. In reference to the meaning of "freeholder" in what is now *Art. I, § 26* of the Missouri Constitution, the Missouri Supreme Court said:

> . . . a freeholder is one who owns "a freehold estate; that is an estate in lands, tenements, or hereditaments of an indeterminate duration, other than an estate at will or by sufferance, as in fee simple, fee tail, or for life, or during viduitate, or during coverture, etc." [citation omitted]

Shively v. Lankford, 74 S.W. 835, 838 (Mo. 1903). *See also Grossman v. Patton*, 85 S.W. 548, 549-550 (Mo. 1905); *Kansas City v. Jones Store Co.*, 28 S.W.2d 1008, 1012 (Mo.banc 1930), *cert. den.* 282 U.S. 873 (1930); and *Thomson v. Kansas City*, 384 S.W.2d 518, 520 (Mo.banc 1964). The Missouri Supreme Court's opinion below did not indicate in any manner that it was abandoning, overruling, qualifying or distinguishing any of its prior decisions.

The two other uses of the term "freeholder" in the Missouri Constitution are particularly enlightening. The same term is used for a board to propose a charter for the City of St. Louis: ". . . a board of thirteen freeholders of such city. . . ." *Mo. Const., Art. VI, § 32 (b).* It is also used for boards ". . . consisting of fourteen freeholders . . ." to prepare local charters for counties, including St. Louis County. *Mo. Const., Art. VI, § 18(g).* Appellees would have this Court assume that the language of § 30, requiring "freeholders" to prepare the charter encompassing two jurisdictions whose own separate charters must be drafted by "freeholders", is unintended and mere surplusage.

Under Missouri law, the State Constitution is construed according to the plain and commonly understood meaning of the words used. No forced or unnatural construction is to be utilized. *Roberts v. McNary*, 636 S.W.2d 332, 335 (Mo.banc 1982). Every word is "presumed intended and not meaningless surplusage." *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo.banc 1983).

This case came to the Missouri Supreme Court after a decision by a panel of the Eighth Circuit Court of Appeals that abstention was appropriate. The Missouri Supreme Court was well aware that it was being given an opportunity to address and resolve any unsettled or ambiguous state law issues which might obviate the necessity of dealing with Appellants' federal constitutional claims. *Millsap v. Quinn*, 757 S.W.2d 591, 593; *S.J. A-4.* The court found no such issues.

Despite the extensive arguments by Appellees when they were before the Missouri Supreme Court, that court did not hold that the status of "freeholder" is not a requirement for service under §30, nor did it find that the term has some undefined meaning contrary to its prior decisions.

The opinion of the Missouri Supreme Court recounts (and does not dispute) facts establishing both the facial requirement for, and an actual application of, property-based discrimination under §30. *Millsap v. Quinn*, 757 S.W.2d 591, 593-594; *S.J. A-3 - A-5.* Consistent with the rule that courts reach constitu-

tional claims only when absolutely necessary,[5] the court specifically addressed the federal constitutional claims asserted by Appellants and declared that the Equal Protection Clause was irrelevant because the Board of Freeholders does not exercise "general governmental powers."

B. The holding of the Missouri Supreme Court, that applicability of the Equal Protection Clause is conditioned upon whether a public body exercises general governmental powers, is erroneous.

The premise of the Missouri Supreme Court's decision was the erroneous principle that a specified measure of governmental authority must be involved before the Equal Protection Clause is applicable to the formation and operation of a public body. In fact, it is state action, whether on the face of a regulation or in its application, which triggers Fourteenth Amendment considerations. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

Appellees assert that a Board of Freeholders (whose broad powers are discussed in Appellants' Brief on the merits, 22-25) is an integral part of Missouri's legislative system which Appellees equate with the Missouri General Assembly and the right of initiative. *Appellees' Brief, 21.* Appellees' assertion confirms the critical importance of the right which Appellants seek to protect: the right of service on a tax-supported public body performing a unique and fundamental governmental function.

This Court has frequently subjected governmental activities of far more limited authority than a Board of Freeholders to equal protection scrutiny. In addition to the primary election candidate cases such as *Bullock v. Carter,* 405 U.S. 134 (1972) and *Lubin v. Panish,* 415 U.S. 709 (1974), discussed in Appellants' Brief on the merits, 31-34, this Court has also applied

[5] *State ex rel. Williams v. Marsh,* 626 S.W.2d 223 (Mo.banc 1982); *United States v. Clark,* 445 U.S. 23 (1980).

constitutional standards to the question of qualifications for a candidate seeking election to a limited state constitutional convention. *McDaniel v. Paty,* 435 U.S. 618 (1978). While that case concerned a First Amendment issue, there was no question that constitutional protections were applicable by the Fourteenth Amendment. *Id.* at 629. Indeed, Justice White, concurring in the judgment, stated that the case could have been resolved solely on the basis of the Equal Protection Clause. *Id.* at 643.

In *Carter v. Jury Commission of Greene County,* 396 U.S. 320 (1970), the Court considered the issue of discrimination in the appointment of jury commissioners charged only with the obligation of compiling a list of potential jurors, and stated: "For present purposes we may assume that the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves." *Id.* at 338.

Likewise, this Court applied equal protection standards in *Mayor of the City of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974), a challenge to allegedly discriminatory appointments to a city board responsible merely for nominating to the mayor potential candidates who might later be appointed to a school board. Although determining that there was a failure of proof (*Id.* at 616), the Court did not hold that such a nominating board exercised so little governmental power as to be beyond the reach of the Fourteenth Amendment.

This Court has subjected to equal protection scrutiny a very similar process of local governmental reorganization by referendum. In *Lockport v. Citizens for Community Action,* 430 U.S. 259 (1977), the Court tested the process by which such a proposition was submitted to the electorate and found that the system used in that instance (involving separate majority requirements in different jurisdictions) satisfied Fourteenth Amendment requirements.

These cases demonstrate that the premise of the Missouri Supreme Court's decision is erroneous. The discrimination which the Missouri Supreme Court acknowledged cannot be insulated from equal protection guarantees by the inaccurate and immaterial assertion that a Board of Freeholders does not exercise general governmental powers.

IV

There Is No Rational Relationship Between A Requirement For Ownership Of Real Property And Service On A Public Governmental Body Having The Broad Authority Of A Board Of Freeholders.

Appellees' efforts in their Brief (41-42) to develop a rational basis for the freeholder qualification of §30 are not persuasive. The Board's authority is too broad to support a property ownership restriction of its membership.

The plan proposed by the present Board touches every aspect of the traditional relationship between individual resident and local government. The widest array of residents should be eligible for selection to prepare such a wide-ranging proposal. Members of a significant, identifiable segment of the population cannot constitutionally be excluded on grounds wholly unrelated to their knowledge and experience in area affairs.

Appellees' various arguments for rationality fail to consider that §30 does *not* require the Board member's real property to be located within St. Louis City or County. Nor does §30 require a Board member to own a home, as opposed to commercial, agricultural or vacant real property.

Thus, it is even less possible to justify the restriction here than in *Chappelle*, where this Court held unconstitutional a requirement of property ownership *within* the area affected. *Cf. Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159 (1977). Also, the analogy of Chief Justice (then Justice) Rehnquist, dissenting in *Chappelle, supra* at 159, 160, that owning

assessable personal property *within* the parish was equivalent to a residency requirement, would not apply here. The Missouri Constitution already has a specific residency requirement resulting from the "elector" qualification. *Mo. Const., Art. VI, § 30.*

Appellees' contention that home ownership is indicative of interest and commitment to the area and its future which is superior to that of residents not owning realty, was specifically rejected by this Court in *Turner*. The members of the Appellant class are taxpayers, residents and voters and cannot be presumed to lack an attachment to the St. Louis area. *Turner v. Fouche*, 396 U.S. 346, 364. Their individual reasons for not owning realty may be financial, or personal preference, or even adherence to a vow - as in the case of the discarded nominee, Father Reinert. *J.A. 22, ¶ 19,20.*

The irrationality of the property ownership requirement is well illustrated by Appellees' strained attempt to justify it. Appellees hypothesize that home buying is a unique "educational experience," and that the subsequent expense of selling will keep buyers from leaving the community and make them more "stable". *Appellees' Brief, 41, 42.* Describing the freeholder requirement as a "*prospective* durational residency requirement" (*Id. 41*), only serves to further demonstrate its unconstitutionality.[6]

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[6] Under Appellees' argument, if § 30's freeholder requirement *was* intended to enforce a durational residency requirement, it would infringe the "fundamental" constitutional right to travel, thereby necessitating heightened constitutional scrutiny. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). Appellees do not assert that the freeholder requirement can survive that level of scrutiny.

Residency restrictions on public office have been approved when they have been reasonably necessary to serve a compelling state interest of ensuring that would-be public servants are familiar with area concerns *before* holding office. *Chimento v. Stark*, 353 F.Supp. 1211, 1215 (1973, D.C. N.H.), *aff'd* 414 U.S. 802 (1973). Appellees' suggestion that the property ownership requirement of § 30 is intended to inhibit people from leaving the area *after* holding office is not only incredible, it would also be unconstitutional.

Such illusory assertions only emphasize the accuracy of this Court's statement in *Turner* that "it seems impossible to discern any interest the qualification can serve." *Turner, supra,* at 363.

CONCLUSION

Article VI, § 30 of the Constitution of the State of Missouri violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the rights of the Appellant class. The decision of the Missouri Supreme Court should be reversed.

April 17, 1989

Respectfully submitted,

KEVIN M. O'KEEFE*
CHARLES W. BOBINETTE
UTHOFF, GRAEBER,
BOBINETTE & O'KEEFE
906 Olive Street - Suite 300
St. Louis, Missouri 63101
(314) 621-9550
(*Counsel of Record*)

And

JESS W. ULLOM
MARK D. MITTLEMAN
KAVENEY, BEACH, BOND,
ULLOM & BURCKE
222 South Central, Suite 900
St. Louis, Missouri 63105
(314) 863-8484

Attorneys for Appellants

AMICUS CURIAE

BRIEF

NO. 88-1048

IN THE

Supreme Court of the United States

October Term, 1988

ROBERT J. QUINN, JR. and PATRICIA J. KAMPSEN, individually and on behalf of all other similarly situated individuals,

Appellants,

vs.

WAYNE L. MILLSAP, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF APPELLANTS

STANLEY E. GOLDSTEIN
KAY SHERMAN
POPKIN & STERN
8182 MARYLAND AVENUE
ST. LOUIS, MO 63105
(314) 862-0900

KATHLEEN L. WILDE
(COUNSEL OF RECORD)
LAUGHLIN MCDONALD
NEIL BRADLEY
DEREK A. ALPHRAN
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
44 FORSYTH STREET, NW
ATLANTA, GA 30303
(404) 523-2721

COUNSEL FOR AMICI CURIAE

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (hereinafter "ACLU") is a nationwide, private membership organization whose sole purpose is the defense of the bill of rights of the Constitution of the United States. To advance this goal, the ACLU engages in civil rights and constitutional litigation throughout the nation and conducts public education. The ACLU of Eastern Missouri is a state affiliate of the ACLU.

One of the ACLU's primary emphases has been on challenging barriers to political participation, especially barriers affecting minorities, including at-large elections, discriminatory reap-

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[1] Appellants and appellees have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

portionment, failure to comply with preclearance under Section 5 of the Voting Rights Act (42 U.S.C. §1973c), discriminatory appointment systems, restrictions on candidacy and obstacles to voter registration. Since 1965, it has participated in scores of voting rights cases, including Rogers v. Lodge, 458 U.S. 613 (1982); McCain v. Lybrand, 465 U.S. 236 (1984); and Hunter v. Underwood, 471 U.S. 222 (1985).

The ACLU files this brief amicus curiae so that it may give the Court its views on the importance of the governmental powers exercised by the St. Louis City/County Board of Freeholders, and the reasons the "freeholder" requirement should be subjected to heightened scrutiny, including the discriminatory impact of such a restriction on political participation by minorities and the poor.

INTRODUCTION AND SUMMARY OF ARGUMENT

Missouri, under its constitution, limits service on the St. Louis City/County Board of Freeholders to citizens owning real property. The limitation has its origins in the British concept that "freeholders were and should remain the backbone of state and society because they were the repository of virtues not found in other classes." Williamson, American Suffrage: From Property to Democracy 1760-1860 (Princeton University Press: 1960), p. 3. Such a limitation on political participation is antithetical to fundamental constitutional requirements of rationality and fairness.

This case is controlled by Turner v. Fouche, 396 U.S. 346 (1970), which invalidated freeholding as a requirement for service in public office. The Board of Freeholders exercises important

governmental powers, affecting the organization and structure of city and county governments in the St. Louis area. The State of Missouri has not articulated a single rationale for this property-based exclusion.

Even were Turner not controlling, the freeholder requirement does not pass constitutional muster. It interferes with rights protected by the First as well as the Fourteenth Amendments, and must therefore be subjected to heightened scrutiny. The rights of St. Louis voters are heavily burdened by this limitation on Board candidacy. Petitioners are deprived of their right to participate in an integral part of the political process. Further, the requirement invidiously discriminates against a substantial segment of the electorate, particularly minorities and the poor.

Under any constitutional test, the provision must fail.

ARGUMENT

I. THE FREEHOLDER REQUIREMENT BEARS NO RATIONAL RELATIONSHIP TO ANY LEGITIMATE STATE INTEREST

This Court has already decided that requiring appointees to public office to be freeholders violates the constitution. In Turner v. Fouche, 396 U.S. 346 (1970), this Court held that a Georgia statute limiting membership on a school board to freeholders violated the equal protection clause of the Fourteenth Amendment:

> [T]he appellants and members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

396 U.S. at 362-363.

Fouche did not address the

appropriate level of scrutiny to be applied to qualifications of candidates for appointment to public office. The Court held that the freeholder requirement did not pass muster even under the most lenient constitutional scrutiny. The Court found that even a rational basis was lacking for excluding non-freeholders as candidates because the classification "rests on grounds wholly irrelevant to the achievement of a valid state objective." 396 U.S. at 362. The state could not assume that those persons who owned property were better suited to serve on the board of education than those who do not.

> It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the Board of Education's own levy on real property.
>
> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.

396 U.S. at 363-364. Seven years later, this Court reaffirmed the holding in Fouche by summarily striking down a Louisiana requirement that conditioned appointed membership on an airport commission on ownership of "property assessed" with the county. Chappelle v. Greater Baton Rouge Airport District, 431 U.S. 159 (1977).

More broadly, this Court has repeatedly rejected economic status as a legitimate criteria for holding public office. In Bullock v. Carter, 405 U.S. 134 (1972), the Court unanimously held that the filing fee required by Texas as a condition for inclusion on the primary ballot was violative of the equal protection clause. While the Court acknowledged that there might be some relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy, it found that the fee requirement must fail because it also excluded legitimate candidates who were unable to pay the fees. Id., at 145-146. In Lubin v. Panish, 415 U.S. 709 (1974), the Court reiterated that a state cannot require an indigent candidate to pay a filing fee in order to run for

public office because filing fees "do not, in and of themselves, test the genuineness of a candidacy." 415 U.S. at 717. See also Harper v. Virginia State Board of Election, 383 U.S. 663, 668 (1966) ("wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process").[2]

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2 Economic-based distinctions have also been summarily rejected in reapportionment cases. The Court in Reynolds v. Sims, 377 U.S. 533, 568 (1964), found an Alabama legislative apportionment plan challenged as violation of equal protection to be "completely lacking in rationality." The Court stressed that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation." Id., at 579-580. "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U.S. at 560-561 (emphasis added). See also Gray v. Sanders, 372 U.S. 368, 379-381 (1963).

The consistent rationale of these cases is that an individual's economic status, whether it be evidenced by wealth or ownership of real property, does not by itself make that individual better qualified than others for public service. Missouri's decision that only freeholders are eligible for membership on the Board of Freeholders is totally contrary to "our tradition...of hospitality toward all candidates without regard to their economic status." Lubin v. Panish, 415 U.S. at 717-718.[3]

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[3] As noted by the Fifth Circuit in Woodward v. City of Deerfield Beach, 538 F.2d 1081, 1083 (1976), in striking down a city charter provision requiring candidates to be freeholders,

> Limiting at any level the rights of members of the community to participate in the political process because of their economic station in life offends our most basic understanding of the nature of our government and society. Despite the

The Missouri Supreme Court sought to rely on those cases where this Court has recognized that a rational basis may justify limiting the franchise to freeholders -- when the election at issue is for a "special limited interest" district whose activities have "a disproportionate effect" on "landowners as a group." Salyer Land Co. v. Tulare Lake Base & Water Storage District, 410 U.S. 719, 728 (1973), Associated Enterprises, Inc. v. Toltec Water Shed Improvement District, 410 U.S. 743 (1973), Ball v. James, 451 U.S. 355

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3 (cont.)

> historic presence of freeholder requirements, the promise of the Declaration of Independence that "all men are created equal" and that "Governments are instituted among Men, deriving their just powers from the consent of the governed," requires that all members of the political community be considered political equals.

(1981). However, those cases are easily distinguished.

In Salyer, a water storage district was created for the purpose of acquiring, storing and distributing water for agricultural purposes. 410 U.S. at 728. The entire cost of the district's activities was apportioned among the landowners. Id., at 724. This Court concluded that if a governmental entity exercises narrowly drawn functions which affect a particular group, that group may permissibily exercise more immediate control over the management of the entity than their numbers would dictate. See Ball, 451 U.S. at 372 (Powell, J., concurring).

In Associated Enterprises, this Court upheld a similar restriction on voting for a Wyoming watershed district. As in Salyer, the Court found a rational basis for the imposition of

the freeholder requirement because the district was one of "limited purpose whose activities have a disproportionate effect on landowners." 410 U.S. at 744, 745. And in Ball v. James, this Court upheld an Arizona voting scheme which limited voting eligibility for a water reclamation district to landowners, on the ground that the district had as its "primary and originating purpose" the "narrow" function of storing and conserving water which was then "distributed according to land ownership." Ball, 451 U.S. at 367. The court tested both the district's purpose and the "special relationship of one class of citizens" to that district and concluded that the "one-person, one-vote" requirement of Reynolds v. Sims did not apply. Id., at 357.

The mission of the Board of Freeholders in this case, namely, to

write a comprehensive charter to reorganize basic government functions for St. Louis County and City distinguishes it from the specialized water districts considered in Salyer, Associated Enterprises, and Ball. The Board of Freeholders is empowered by the Missouri Constitution to "prepare and propose a plan for execution of the powers herein granted and for the adjustment of all matters and issues arising thereunder." The powers granted in Section 30(a) include the consolidation, extension and enlargement of the existing political boundaries of the city and county, the establishment of metropolitan districts, the administration of municipal services, and the formulation of any other plan for the partial or complete government of all or any part of the city and county. Furthermore, the Board of Freeholders is supported by general revenue funds of the

county and city, not by property owners alone. Mo. Const., Art. VI, Sec. 30(a), S.J.- A-27. In sum, there is simply nothing about property ownership which is uniquely affected by or specially related to the right to participate in drafting a plan for local government reorganization.

Even were the Board of Freeholders a "limited governmental district," the state would still be required to demonstrate, at a minimum, that the "freeholder" requirement was rationally related to a legitimate state interest. Disregarding that requirement, the Missouri Supreme Court did not identify a single state interest served by Missouri's exclusion of non-property owners from the Board of Freeholders. In fact, the actions taken by Missouri officials strikingly demonstrate that freeholder status is irrelevant to fitness for service on the Board. The

Mayor of St. Louis originally included in his list of nominees for the Board of Freeholders a person who was not a freeholder; this nominee's name was subsequently deleted because he did not own real property. Stipulation of Fact No's 19-20, J.A. 22. Similarly, the County Executive prepared his list of appointees first, and only later confirmed that the persons he had chosen were also owners of real property. Stipulation of Fact No's 16-17, J.A. 20-21. Obviously, the Mayor and County Executive recognized that other significant criteria, and not property ownership, attested to the suitability and seriousness of a candidate for service on the Board.[4]

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[4] The Missouri Supreme Court opinion states that Mayor Schoemehl's criteria included "a history of community and civic service, intelligence and

There is no contention here that members of the Board of Freeholders must be elected rather than appointed. Sailors v. Kent County Board of Education, 387 U.S. 105 (1967). Whether or not the authority and responsibilities of the Board "are general enough and have sufficient impact throughout the district," Hadley v. Junior College Dist., 397 U.S. 50, 54 (1971), to require the application of the one-person, one-vote doctrine to the Board is a question not presented. The power of a board, though ad hoc, to propose a revision of

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[4] (cont.)
independence, and geographic and racial distribution;" County Executive McNary "sought candidates who had no vested interest in a governmental organization in the St. Louis area, showed leadership in the community, had an interest in county programs, would be able to work with other Board members, and represented a geographical mix of the county." Millsap v. Quinn, 757 S.W.2d 591, 595 (Mo. banc 1988).

the entire governmental structure of the city and county is at least as broad and of general impact throughout the jurisdiction as the budgetary, contract, land use and franchise decisions of the New York City Board of Estimate. Board of Estimate of City of New York v. Morris, Supreme Court No. 87-1022 (March 22, 1989). Whether or not the one-person, one-vote rule would be applicable to an elected Board of Freeholders, the fourteenth amendment's restriction on property qualifications for public office is applicable to the Board. Fouche, supra.

In this case, as in Fouche, the lack of ownership of real property does not indicate "a lack of attachment to the community and its...values." Fouche, 396 U.S. at 364. Nor can it be deemed to "insure that the members of the commission would have a substantial

interest in performing their duties effectively and conscientiously." Chappelle v. Greater Baton Rouge Airport District, 329 So.2d 810, 814 (La. App. 1976), reversed 431 U.S. 159 (1977). Given the exceedingly broad range of issues to be decided by the Board of Freeholders, "it seems impossible to discern any interest the qualification [of holding property] can serve." Id.[5]

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[5] The only proffered purpose which appears anywhere in the record is the suggestion by the trial court that the property qualification "could enhance the work of a board of freeholders" because "one critical question is change of boundaries." Millsap v. Quinn, No. 572794, St. Louis County Circuit Court, A-19. That justification is no more rational than the one rejected in Fouche. Not all freeholders possess special knowledge about city and county property boundaries. And Missouri may not constitutionally "presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold." Turner v. Fouche, 396 U.S. at 363-364.

II. THE FREEHOLDER REQUIREMENT INFRINGES RIGHTS PROTECTED UNDER BOTH THE FIRST AND FOURTEENTH AMENDMENTS, AND MUST THEREFORE BE SUBJECTED TO HEIGHTENED SCRUTINY

A. The Right of a Citizen to Participate In the Political Process is Protected Under the Equal Protection Clause And the First Amendment of the United States Constitution

At issue in this case is the right of all citizen electors in the city and county of St. Louis to participate on a Board of Freeholders charged with proposing constitutional changes in their government. This right to full participation in the political process is not only based upon the Fourteenth Amendment Equal Protection Clause, but also firmly rooted in the fundamental rights accorded citizens by the First Amendment. Since, under Turner, the challenged Missouri scheme fails even a minimum rationlity, it obviously cannot survive the stricter scrutiny that amici

believe is appropriate in these circumstances.

By imposing a "freeholder" requirement, Missouri has impaired petitioners' First Amendment rights in two ways. First, by conditioning candidacy on "freeholder" status, it has impermissibly restricted who may be appointed to the Board. Second, in so doing, it has impermissibly restricted the choices available to voters, by affecting the issues discussed by Board members and the ultimate shape of the plan.

> The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Williams v. Rhodes, 393 U.S. 23, 31 (1968). See also Lubin v. Panish, 415 U.S. 709, 716 (1974)(primary election). Like voters and candidates who seek political expression different from that

offered by one or two political parties, non-freeholders of St. Louis are entitled to participate in the political process, by Board service and by voting on ballot choices not filtered solely through freeholders, unfettered by nineteenth century concepts of the social merit possessed by those who own freehold estates. Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966)("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.")[6]

The right of individuals to associate for the advancement of

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[6] As this Court stated in Williams v. Rhodes, "This does not mean that every voter can be assured that a candidate to his liking will be on the ballot, but the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." If the choices have been limited, the right to vote has been "heavily burdened." 393 U.S. at 716.

political beliefs is protected against federal encroachment by the First Amendment. Williams v. Rhodes, 393 U.S. 23, 30 (1968). "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association." Id., at 41 (Harlan, J., concurring). In St. Louis, however, the right to participate in the debate, to form and frame the basic structures of the society, rests only with freeholders. The power of the Board of Freeholders to propose sweeping changes in the governance of the city and county of St. Louis is essentially that of a state constitutional convention. Participation on such a body may be our

most basic act of political expression.[7]

In case after case, following Williams v. Rhodes, the Court has insisted that restrictions on candidate or party qualifications be "essential to serving a compelling state interest." Storer v. Brown, 415 U.S. 724 (1974). In Anderson v. Celebreeze, 460 U.S. 780 (1983), this Court clearly followed a dual test in a candidate restriction case:

> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789. See also Eu v. San Francisco County Dem. Central Comm., 57 U.S.L.W. 4251, 4253 (Feb. 22, 1989).

While what Justice White has called the Williams - Kramer - Dunn rule[8] does not automatically invalidate every substantial restriction on the right to vote, it does suggest that such

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[7] The First Amendment prohibits restrictions on the exposition of ideas. The right of freedom of speech assures "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). This no more than reflects "[o]ur profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Buckley v. Valeo, 424 U.S. 1 (1976).

[8] Williams v. Rhodes, 393 U.S. 23 (1968); Kramer v. Union Free School District, 395 U.S. 621 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972).

restrictions will be subject to strict scrutiny and will not be sustained without a demonstration that the limitation is in furtherance of a compelling state interest. See Harper v. State Board of Elections, 383 U.S. 663 (1966); Cipriano v. City of Houma, 399 U.S. 204 (1970); Hill v. Stone, 421 U.S. 289 (1975).[9]

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[9] In reviewing restrictions on political participation, this Court has described the appropriate standard in various ways. In Reynolds v. Sims, 377 U.S. 533 (1964), an apportionment case, the Court said that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 US at 562. In Meyer v. Grant, 108 S.Ct. 1886 (1988), in which a state statute prohibited paying people to circulate initiative petitions, the Court used "exacting scrutiny." In Hill v. Stone, 421 U.S. 289 (1985) and Dunn v. Blumstein 405 U.S. 330 (1972), the Court held that a "burden on the franchise" was must serve a "compelling state interest." However the standard is described, it is clear that, in areas impinging, either directly or indirectly, on the right to vote, heightened scrutiny is required.

While candidacy for public office has not been held to be a "fundamental right," this Court has recognized that "the rights of voters[10] and the rights of candidates do not lend themselves to neat separations; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972).

The "freeholder" restriction unquestionably implicates both First and Fourteenth Amendment rights. Accordingly, absent a "showing of necessity" by the state, that restriction on Board participation, and the concomitant limitation on voters' rights, is constitutionally infirm. Bullock, supra,

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[10] The right to vote, of course, is itself a "fundamental political right, because [it is] preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

at 144; Lubin, supra, at 716. See also Reynolds v. Sims, 377 U.S. 533, 561-562 (1964).

B. The Freeholder Requirement Invidiously Discriminates Against Black Missouri Citizens

The First Amendment violation resulting from the "freeholder" requirement is compounded by its racial effect.[11] This Court has established that there exists "a federal constitutional right to be considered for public service without the burden of invidiously

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[11] Absent any First Amendment interests, Appellants would of course be required to prove intentional racial discrimination to prevail under the Fourteenth Amendment. Washington v. Davis, 426 U.S. 229 (1976). However, where, as here, the state has imposed limitations on the right to vote and to participate in the political process, the racial effect of that limitation must also be considered in assessing its constitutionality. See discussion at pages 37-38, infra.

discriminatory disqualifications." Turner v. Fouche, 396 U.S. 346, 362-3 (1970). Missouri's "freeholder" requirement impermissibly imposes just such a burden.

In determining what constitutes "invidious discrimination," it is critical to assess the effect of the disputed qualification. Dunn v. Blumstein, 405 U.S. 330, 335 (1972). The Missouri Constitution requires that, in order to be considered for service on the Board, one must be both an elector and a "freeholder." That requirement results in (a) the disqualification of a substantial segment of the electorate, (b) along economic lines, (c) with a racially discriminatory effect. It cannot, therefore, withstand

constitutional review.[12]

In 1980, the city of St. Louis had a population of 453,085.[13] The "free-holder" requirement resulted in the automatic disqualification of 54.8% of the city's residents from service on the Board of Freeholders.[14] In St. Louis

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[12] The fact that a qualificaton "poses a barrier to the candidacy of a not insubstantial segment of the community and, to tha degree, limits the voters in their choice of candidates" in and of itself requires the application of a "stricter standard of review." Chimento v. Stark, 353 F.Supp. 1211 (D.N.H.)(three judge), aff'd 414 U.S. 802 (1973). Chimento involved a challenge to a residency requirement for gubernatorial candidates, but its logic is directly applicable to the instant case, where the exclusion of renters and the poor -- particularly poor blacks -- from the Board affects the elements of the plan presented to St. Louis voters.

[13] 1980 Census of Population, General Population Characteristics, Missouri, PC80-1-B27 Mo., Table 15, p. 27-17.

[14] According to the 1980 Census, there are 178,048 occupied housing units in the City of St. Louis. Of those,

County, 25.9% of the county's 973,896 residents were disqualified from service on the Board by the "freeholder" requirement.[15]

Not surprisingly, it is the poorer residents who are disqualified. The median income of householders in the City of St. Louis who own their units is

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[14] (cont.)
80,392 are "owner occupied" and 97,656 are "renter occupied." 1980 Census of Housing, Detailed Housing Characteristics, Missouri, HC80-1-B27 Mo., Table 75, p. 27-58.

The "renter occupancy" census category is an indictor of who owns real property, and is used here to approximate the exclusionary impact of the "freeholder" requirement.

[15] Of 344,530 occupied housing units in St. Louis County in 1980, 255,189 were owner occupied and 89,341 were renter occupied. 1980 Census of Housing, Detailed Housing Characteristics, Missouri, HC80-1-B27 Mo., Table 95, p. 27-145. The county population is reported in 1980 Census of Population, General Population Characteristics, Missouri, PC80-1-B27 Mo., Table 15, p. 27-19.

$16,476, as compared with only $8,723 for renters. In St. Louis County, the median income of householders in owner-occupied units was $25,244, as compared with $14,726 for renters.[16]

Both this Court and the Congress of the United States have acknowledged that historic discrimination in education, housing, employment and health services has often resulted in a lower socio-economic status for blacks as a group than whites. One of the "typical factors" listed by the Senate Judiciary Committee as probative of vote dilution is

> the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process....

S. Rep. 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206-207. See also White v. Regester, 412 U.S. 755 (1973) and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Moreover,

> [t]his lower [socio-economic] status both gives rise to special group interests, and hinders black's ability to participate effectively in the political process...

Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 2760 (1986).

The economic exclusion worked by the "freeholder" requirement clearly has a disproportionate impact on Missouri's black citizens. Blacks constitute 45.6% of the total population in the City of St. Louis and 11% in St. Louis

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16 1980 Census of Housing, Detailed Housing Characteristics, Missouri, HC80-1-B27 Mo., Table 75, p. 27-58 (as to St. Louis City) and Table 95, p. 27-145 (as to St. Louis County).

County.[17] They are disproportionately represented among the poor. Nearly half (40.9%) of the blacks in the City of St. Louis living in rented units had income below the poverty line, as compared with 17.7% of whites; in both the city and county, blacks living below the poverty level -- in both owner and renter categories -- outnumbered whites by more than two to one. Finally, and most significantly, fewer blacks are "freeholders" than whites. Sixty-one (61%) of the city's black householders rent their housing units, as compared with 50.6% of the city's white householders. In St. Louis County, 35.6% of black householders are renters, as compared with 24.7% of white

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17 1980 Census of Population, General Population Characteristics, Missouri, PC80-1-B27 Mo., Table 15, pp. 27-17 and 27-19.

householders.[18]

In circumstances such as these, the "freeholder" requirement is itself an instrument of official, racial discrimination, and operates to restrict black participation in the political process.[19] Lodge v. Buxton, 639 F.2d 1358

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18 1980 Census of Housing, Detailed Housing Characteristics, Missouri, HC80-1-B27 Mo., Table 81, p. 27-74; Table 82, p. 27-77; Table 97, p. 27-163.

19 The result of this restriction of black participation is a plan that will seriously decrease the number of black officeholders in municipal governments in Missouri. In 1987, there were 113 black elected municipal officials in Missouri; 66 of them (58%) served in the area affected by the plan, 16 in the City of St. Louis and 50 in other cities in St. Louis County. The consolidation proposed by the Board of Freeholders will reduce the number of municipalities from 90 to 37, and will affect the positions held by 45 of the 66 black elected city officials. Five of the black mayors and 32 of the municipal officials will be consolidated into a single city. Black Elected Officials: A National Roster, Joint Center for Political Studies, Washington, D.C. (1987), pp. 261-269. Plan for

(5th Cir. 1981), affirmed sub nom Rogers v. Lodge, 458 U.S. 613 (1982). Lodge was a voting rights case, challenging the method of selection of county commissioners in Burke County, Georgia. The evidence in the case included a Georgia statute which stated that "[n]o

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19 (cont.)
Governmental Reorganization in St. Louis & St. Louis County, St. Louis City/County Board of Freeholders, September 1988, pp. 4-5, and map.

Moreover, the disproportionate exclusion of blacks from service on freeholder boards will have a broader impact on black political participation. Service on such boards is often a stepping stone to higher political office. Board members learn a great deal about the operation of government, and come in contact with influential people in the community. They are also therby afforded political exposure, through the media, and enhanced name recognition, which make it easier to later run for higher office. In a very real sense, service on a local board or commission is an apprenticeship for elected office. Prewitt, The Recruitment of Political Leaders: A Study of Citizen-Politicians (Bobbs-Merrill Company, Inc.: 1972), pp. 112-114.

person shall be eligible to serve as chief registrar unless such person owns interest in real property..." 639 F.2d at 1378. The court of appeals deemed the statute

> significant evidence of official present discrimination...Given the testimony that significantly fewer blacks than whites are freeholders, the [District] Court concluded that the statute operated to restrict black participation in the electoral process.

Those findings were accepted by this Court, and found "sufficient to sustain the [District] Court's judgment." 458 U.S. at 627.

Such a racially discriminatory requirement cannot be sustained. The Court's analysis in apportionment cases, brought under the Equal Protection Clause, is particularly applicable. Where

apportionment structures are found to "contain a built-in bias tending to favor particular...political interests," the plan cannot survive constitutional scrutiny. Brown v. Thomson, 462 U.S. 835, 843 (1983), citing Abate v. Mundt, 403 U.S. 182, 187 (1971). Further, state factors resulting in population deviations must be "free from any taint of arbitrariness or discrimination." Roman v. Sincock, 377 U.S. 695 (1964).

Missouri's constitutional requirement that members of the Board empowered to alter the structures of general government in the St. Louis area be "freeholders" is infected with an invidious racial taint. The "built-in" bias against the poor is also an impermissible bias against Missouri's black citizens. Under any constitutional test, the provision must fail.

III. SUBMISSION OF THE PLAN DEVISED BY THE BOARD OF FREEHOLDERS TO THE AREA ELECTORATE DOES NOT CURE THE CONSTITUTIONAL INFIRMITY

Under the Missouri Constitution, the power to make fundamental decisions concerning the general governmental structure of the city and county of St. Louis is committed to the Board of Freeholders. That the ultimate plan devised by that board must be submitted to area voters, for approval or rejection, does not cure the constitutional violation. The decisions made by the Board of Freeholders are an integral part of the restructuring process, and appellants are constitutionally entitled to participate.

The exclusive procedure established under the Missouri Constitution for altering the fundamental structure of the general government of the city and county of St. Louis is set forth in Section 30

of Article VI. It is a three-step process. First, petitions containing the signatures of three percent of the registered voters of the city and county must be presented, requesting the establishment of a Board of Freeholders. A Board is then constituted, and given exclusive authority for "formulating and adopting a plan to provide for the partial or complete government of all or any part of the county and city." Finally, the plan is submitted to the area voters, for approval or rejection in toto. Mo. Const., Art. VI, Sec. 30(a).

The pivotal role of the Board of Freeholders in this process cannot seriously be disputed. It is the Board which is given the authority to formulate the restructuring plan, and to make the fundamental decisions -- on revenue, on municipal consolidation, on city

boundaries -- that alter the general government of St. Louis and St. Louis County, and affect the lives of all area citizens.

The exclusion of non-freeholders from such an important part of the process is not unlike the exclusion of black citizens from the "white primaries" first invalidated by this Court in Nixon v. Herndon, 273 U.S. 536 (1927). Among the arguments advanced to justify a racially exclusive primary was that since "officers of government cannot be chosen at primaries," primaries were exempt; constitutional requirements should "only [be] applicable to general elections where governmental officers are actually elected." Smith v. Allwright, 321 U.S. 649, 657 (1944). In rejecting that argument, the Court emphasized the "unitary character of the electoral process," 321 U.S. at 661, finding that

"the primary is by law made an integral part of the election machinery." 321 U.S. at 660. Choices made by the Board of Freeholders, no less than a primary election, are an integral part of the political process. In the political process, the power to define or limit choices is the penultimate power.

Limiting non-freeholders to a "yea" or "nay" vote on the final plan makes them the same kind of "perfunctory ratifiers of the choice that has already been made" as Texas' black voters, who, though excluded from the white primary, could vote in the general election. See Terry v. Adams, 345 U.S. 461, 469 (1953). The Court, in overturning the Texas system, explained that

> The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure ...is to...strip Negroes of every

> vestige of influence in selecting officials who control the local county matters that intimately touch the daily lives of citizens.

Terry, 345 U.S. at 469-470.

By excluding non-freeholders from the Board which determines the structure of St. Louis government, Missouri has likewise denied them any effective influence in "local county matters that intimately touch [their] daily lives."

CONCLUSION

For the foregoing reasons, the judgment of the Missouri Supreme Court should be reversed.

March 24, 1989

Respectfully submitted,

STANLEY E. GOLDSTEIN
KAY SHERMAN
Popkin & Stern
8182 Maryland Avenue
St. Louis MO 63105

KATHLEEN L. WILDE
(Counsel of Record)
LAUGHLIN McDONALD
NEIL BRADLEY
DEREK ALPHRAN
American Civil Liberties
Union Foundation, Inc.
44 Forsyth St NW
Atlanta GA 30303
(404) 523-2721

ATTORNEYS FOR AMICI CURIAE